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IN THE

Supreme Court of the United States

October Term, 1956

No. 322

GEORGE E. SHIBLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner, George E. Shibley, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on June 18, 1956.

Opinion Below.

The opinion of the court below (App. A) has not yet been officially reported.

Jurisdiction.

The judgment of the Court of Appeals (App. B) was entered on June 18, 1956. The time to file this petition for a writ of certiorari was extended to August 17, 1956, by order of Mr. Justice Burton dated July 9, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented.

1. Whether, contrary to the decisions of this Court in *Offutt v. United States,* 348 U. S. 11, and *Cooke v. United States,* 267 U. S. 517, the history and policy of 18 U. S. C. 401 and Rule 42(a), Federal Rules of Criminal Procedure, and the due process provisions of the Fifth Amendment, the court below erred in holding that the trial judge was qualified to try the summary contempt charges against petitioner and to impose a sentence of imprisonment upon petitioner, despite the fact—as the evidence in the record and the certificate of contempt plainly show—that the contempt charged was entangled with the trial judge's personal feeling against the petitioner.

2. Whether, contrary to law and the due process provisions of the Fifth Amendment, the court below erred in holding that the trial judge had the power and jurisdiction, almost two months after the termination of the trial to conduct a summary contempt proceedings and impose a sentence of imprisonment upon petitioner.

3. Whether, contrary to the history and policy of 18 U. S. C. 401 and Rule 42(a) of the Federal Rules of Criminal Procedure, and in derogation of the rights of an accused to a fair trial and the effective assistance of independent counsel, the court below erred in holding that the evidence in the record was sufficient to support the certificate and judgment of contempt and the sentence of imprisonment imposed therein.

Statutes Involved.

The pertinent statutes and rules involved are set forth in Appendix C.

Statement of the Case.

When the trial in the principal cause below was concluded with a verdict of acquittal, the following occurred:

"The Court: The Clerk will record the verdict. Ladies and gentlemen of the jury, . . . I consider your verdict a miscarriage of justice.

If there ever was a simple case presented to a jury, when it is all boiled down on the issues of the case, this was a simple case. . . .

. . . On a verdict of acquittal the Government has no appeal, and that is the end of the case on the counts on which there has been an acquittal. If the defendant is convicted, of course the defendant has an appeal. So that is the end of the counts on which you have returned a verdict. And I tell you that the issue, after all the smoke was blown away, was a relatively simple issue, and if jurors in cases like this bring in this kind of verdict, the Government might well save its money in trying cases involving the United States before juries . . .

. . . I now excuse you, but I suggest you remain in your seats for just a moment. . . .

Mr. Shibley, you accused the officers in the Marine Corps of perjury, you accused Mr. Deutz of dishonesty, you accused me of reading the instructions in such a way as to indicate in one place that I almost shouted that they should convict the defendant, that when I read the alternate propositions on innocence that I used an entirely different tone of voice; you have been repetitious in your objections, and you generally conducted yourself in a way ill fitting a lawyer in this court. You will be here Monday morning at 10:00 o'clock, and the court will take up at that time the matter of summary contempt. . . .

Ladies and gentlemen of the jury, you are excused, you may now withdraw" [R. 2559-63].[1]

The Summary Contempt Proceedings—the Trial Judge and the Petitioner.

The proceeding herein is a companion proceeding to *Shibley v. United States, No. 243, petition for certiorari pending in this Court.* The two cases were argued below at the same time, and their connection, stemming from the same background, was noted by the Court of Appeals in both cases (No. 243, App. A, pp. 3-4; App. A, pp. 1-2). We do not repeat much of the background detailed in the Statement of the Case in the companion proceeding (No. 243, pp. 4-310), but in the light of the position taken by the trial judge in the trial and the summary contempt proceeding herein, an example of which has been aforestated, some brief reference to the source of these two proceedings is essential.

Petitioner in 1952 had been a member of the Bar for a period of seventeen years [R. 1226]. In July, 1952, he was retained to represent one John Russell Bennette, a Master Sergeant in the Marine Corps [R. 1227]. As civilian counsel for the aforesaid Marine, petitioner, in defense of his client, was compelled to make serious charges in Washington, D. C., against the Marine Sergeant's military superiors [Ex. 1-A, R. 957]. The content of these charges having come to the attention of the accussed Marine officers, a court of inquiry was convened by the officers at the El Toro Marine Base [R. 1231]. Petitioner was brought before this self-constituted

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[1]References designated "R." are to the Reporter's Transcript of proceedings. References to the Clerk's Transcript of Record below are "C. Tr."

court of inquiry and subjected to a "grilling" which lasted five days [R. 1233-6] and in the course of which he was forcibly brought from his law office by armed members of the Marines to the military establishment [R. 1008-9].

Since the trial judge below overtly indicated his belief that petitioner demeaned himself improperly at the trial, just as he allegedly had done before the military court of inquiry, and since this personal view weighed heavily with the court in these summary contempt proceedings, some discussion of the events which occurred in these military proceedings is pertinent here.

The subject matter of the inquiry was the charges made by petitioner, on behalf of his client, against the Marine officers [R. 1256]. The accused commanding officer convened the "court," appointing three subordinate officers of the court, all laymen [R. 423-4, 433]. A Lieutenant Colonel who was one of the accused officers was designated as a "party" to the proceedings [R. 388]. This entitled him to counsel. (50 U. S. C. 731(c).) Sergeant Bennette requested that he be designated as a party, as was his right (50 U. S. C. 731(c)), but this was denied [R. 510]. Thus, petitioner was blocked from appearing as counsel for his client. Instead, petitioner was subpoenaed as a witness before the court of inquiry [R. 1431-4].

Petitioner was brought before a military body and examined in secret. The "court" had counsel [R. 1010], and so did the Lieutenant Colonel [R. 1010], all military officers. Petitioner, before this secret body, asked for an opportunity "to consult my attorney or attorneys, who I understand are enroute to this station and who I understand will arrive within approximately an hour" [R. 1010]. Here is what occurred: Counsel for the Lieutenant

Colonel objected and stated, "The rule is well established that the truth needs no counsel" [R. 1010]. Counsel for the court stated, "If he wants to have his attorney file a writ of habeas corpus, he may do so" [R. 1010]. The "court" ruled: "The objection of the counsel for the interested party is sustained" [R. 1011].

The sole purpose of the five-day secret interrogation was to compel petitioner to retract his charges against the military officers who thus held petitioner captive, or to detail the sources of his information. The petitioner was told that he had "made his bed" and the time had come for petitioner to "put up or shut up" [R. 1357]. These were the precise words of the military officers. The military officers insisted that all the sources of information which led to petitioner's charges against the officers be revealed to them or "tell this court that he has absolutely no basis for any of his malicious and insulting and derogatory remarks that he directed in that letter to the Commandant of the Marine Corps . . ." [R. 1357].

Thus situated, petitioner declined to answer a number of questions propounded to him. Petitioner asserted that he had been denied the right to counsel. He stated that one of the obvious purposes of the inquiry was to censure him and he therefore had the rights of a party under the Military Code. He contested the jurisdiction of the court of inquiry. He challenged the power of the commanding officer under the law to convene the court, and he maintained that the court was neither unbiased nor impartial. He contended that he had been improperly subpoenaed as a witness before the "court" while engaged in essential representation as civilian counsel of a serviceman under charges. He declared that he would not reveal the confidences of his client under such circumstances

nor subject himself by his own testimony to some criminal prosecution [R. 990-1022].

The military officers declared that petitioner, civilian counsel, was in "contempt" of the military court of inquiry, and an information [C. Tr. 2-10] was filed by the Federal prosecutor at the behest of the military in the District Court charging petitioner with violations of 50 U. S. C. 622. At the trial, a number of the military officials testified as witnesses: Colonel Perry K. Smith [R. 254]; Captain John G. Carroll [R. 654]; Lieutenant Colonel Earl E. Anderson [R. 789]; Captain Richard D. Hamilton [R. 1718]; Captain Arnold G. Hewett [R. 1743]. Many other officers appeared solely as spectators in the courtroom and their appearance was particularly noted by the trial judge. The certificate of contempt of the trial judge recites [C. Tr. 679] that "the court stated to certain officers of the U. S. Marine Corps who were present in the courtroom, that since they were lawyers they might desire to attend the session in chambers to observe the discussion and settlement of instructions and informed them they might if they desired, attend the session in chambers. Certain of them did attend the session in chambers as observers."

Throughout the trial, the trial judge evidenced a hostility to petitioner, appearing convinced that somehow petitioner had cleverly put the military "court of inquiry" to rout, that petitioner had thus thwarted justice, that justice would not be done unless petitioner was found guilty of contempt of the military court of inquiry under the information initiated at the behest of the military, and that petitioner was trying to harass the trial judge as he allegedly had done the military court. We cite a few examples from the record:

A. On the motion to dismiss the information at the commencement of the trial:

> "The Court: . . ., I don't know how you, who were called as a witness before a court of inquiry, who were not designated as a party, you who were a civilian and therefore not subject to the Code, except insofar as you might come in as a witness, could contend that you had any right to challenge anybody.
>
> Now, that is where you made your mistake. You were called as a witness, and if you would have stayed in your category as a witness you wouldn't be here today. But relying, apparently, on some advice that is questionable by certain members of the bar, you took a position attempting to depart from your category as a witness, and here you are in the federal court" [R. 194-5].

B. When objection was made to introduction into evidence of a certified copy of the transcript of the proceedings before the court inquiry instead of the original, upon the grounds that discrepancies existed between the two documents:

> "The Court: . . ., I think it is obstructionist tactics entirely, . . .
>
> I agree with you, Mr. Deutz [the prosecutor], I think it is silly, . . . But if Mr. Shibley is going to take the time of the court talking about this certified copy, we have the original here, and into evidence it will go" [R. 332-3].

C. When petitioner requested leave to submit some incomplete memoranda on various legal issues which had arisen during the trial:

> "The Court: I will take it on an installment basis if you want to put in that way, and I will hold my

breath after one installment waiting for the next. Be sure they stop at a good point. 'What will Shibley do in the next installment? He is hanging precariously on the cliff. What will he do? Be sure to see tomorrow's issue' " [R. 373].

D. The direct examination of one prosecution witness was concluded at 4:10 p.m. The customary time for adjournment was 4:30 p.m. Petitioner, in the absence of his co-counsel, began the cross-examination and at the due time asked for the examination to go over to the next day. The court insisted that the cross-examination be concluded "this evening," but after petitioner pointed out that he was not equipped by reason of health and the absence of his co-counsel, the usual adjournment was taken [R. 789-805]:

> "The Court: . . . But when you started the cross-examination of this witness, it was apparent to me that you were stalling until 4:30. I observed you look at the clock. And the questions that you were asking were not doing you any good. . . . If I were representing you and you were my client, I wouldn't let you perform in the manner that you are performing. If I were going to let you perform in the manner in which you are performing, I would just as soon toss in the sponge and enter a plea, as to let you perform as you are performing, if you were my client. . . . I am not asking you to make any statement. You are not required to say a thing. I am just giving you some advice" [R. 806-7].

E. An issue arose as to whether the entire transcript should be submitted to the jury or only a limited portion of it [R. 929-34]:

> "The Court: If you have only the questions, the directions to answer, and the refusals, there is not

very much left for the jury. If, on the other hand, this entire transcript goes to the jury, I will be perfectly frank with you, when you read that transcript the impression I get—and I am not trying these factual matters—is that Mr. Shibley just worked overtime trying to make himself some kind of a defendant in some kind of a proceeding, and that he took time and delayed the court and made repetitious objections, wandered afield" [R. 934].

F. On the motions for judgment of acquittal and to strike testimony at the close of the prosecution's case [R. 1025-43]:

"The Court: Mr. Shibley, I have read that transcript and I marvel at the patience of the court of inquiry.

This is outside the presence of the jury.

If anybody ever ragged a court of inquiry or any other court, you ragged that court. . . . I can't but escape the impression, the conclusion that you worked very diligently to get yourself into some kind of a position where you would be in trouble with some organization. I never saw a fellow work so hard to get himself in trouble with a court of inquiry, or with any court, as you did at El Toro" [R. 1043-4].

G. Petitioner sought to introduce some evidence into the record, and the court requested an offer of proof. During the course of the offer of proof [R. 1818-22], the following occurred:

"The Court: Who are you making a speech to here?

Mr. Shibley: I am making it to your Honor.

The Court: Because there is a reporter sitting over here at the table taking down this flowery oratory?

Mr. Shibley: No, I didn't see a reporter present" [R. 1822].

H. The prosecutor, during the discussion of proposed instructions, informed the trial judge that he proposed to argue before the jury "the way he [the petitioner] was horsing around[2] with the court, the court of inquiry" [R. 2143]:

> "The Court: . . . I will permit you to argue that Shibley horsed around with the court of inquiry, because I think that may be a justifiable argument . . ." [R. 2147].

I. After additional instructions had been given to the jury during their deliberations [R. 2534-5], objections were made in chambers to some of the instructions which had been given and additional instructions requested [R. 2535-44]:

> "The Court: Just a moment. Mr. Shibley's objections and requests are denied. And you have had about three or four of them, and that is all, Mr. Shibley.
>
> Before the Court of Inquiry, after taking up minutes of time and repeating statements of privilege, you would always end up and say, 'May I state further privileges,' and then it would go on again for a long time, and then you would wind up, the court would rule, and then you would say, 'May I state further privileges?' Now you have had about three or four bites at the apple. That is it.
>
> Mr. Shibley: I object to your Honor's manner of speaking to me at this time, in an angry tone of

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[2]The phrase "horsing around" appears in Berrey & Van den Bark, *The American Thesauras of Slang*, p. 988. It appears to be synonymous with the words "interfere" and "meddle" (p. 265).

voice, looking at me in what appears to be a malevolent and angry way, and I assign it as prejudicial error and misconduct.

The Court: I consider you contemptuous of this court, and we will take that matter up later" [R. 2544-5].

J. A motion for mistrial was made [R. 2547] when the United States Attorney and an assistant for the first time seated themselves at the counsel table just when the jury had returned for additional instructions. There was a claim of prejudice and probable coercion [R. 2550]:

"The Court: . . . Now I have heard everything. Talk about Alice in Wonderland. Errors assigned because the United States Attorney, who is the chief law enforcement officer of the United States in the Southern District of California, enters a courtroom where one of his assistants is trying a case. I have heard everything" [R. 2549].[3]

We do not exhaust the examples of the personal involvement of the trial judge in the conduct for which petitioner was punished in summary contempt. The certificate of contempt [C. Tr. 670-85] is replete with further instances. For example, it is alleged that petitioner was in contempt of court because he assigned as judicial misconduct the invitation by the court to the Marine officers to attend the session in chambers, as aforesaid

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[3]Although this motion for mistrial in no way involved the court, still it was included as a ground for the imposition of the prison sentence in the summary contempt proceedings [Specification XIV, *Certificate of Contempt,* C. Tr. 682].

[C. Tr. 679]; that petitioner had accused the court of bias and prejudice against petitioner and in favor of the prosecutor [C. Tr. 679-80]; that petitioner on a request for a recess had made a remark in alleged poor taste to the trial judge [C. Tr. 680]; that petitioner had assigned as error the manner in which emphasis was placed by the trial judgment upon certain portions of the instructions [C. Tr. 681]; that petitioner had assigned as misconduct the judge's manner of speaking to petitioner [C. Tr. 682].[4]

All of this as aforesaid was the forerunner to the final denunciation of the jury and the petitioner at the conclusion of the trial when the verdict of acquittal was returned,[5] as recited initially here at the commencement of this Statement of the Case.

On the issue as to whether the trial judge was qualified to conduct the summary contempt proceedings, the Court

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[4]The view of the trial judge that the petitioner had "horsed around" with the trial judge just as he had allegedly done with the court of inquiry is expressed again in the certificate of contempt: "That this course of conduct was carried on by George E. Shibley throughout the proceedings before the Military Court of Inquiry. That a similar type of proceeding and conduct was carried out by George E. Shibley acting as attorney before this court" [C. Tr. 676]. It should be noted that the court below upheld the contempt judgment because petitioner allegedly brought "the merits of the case" before the military court, into the trial App. A, p. 2).

[5]The information contained nine counts [C. Tr. 2-10]. Three counts were dismissed at the close of the prosecution's case [R. 1070]. The jury acquitted on three other counts and returned no verdict on the remaining counts [R. 2558-9]. Some months later, the remaining counts were dismissed on motion of the prosecutor.

of Appeals answered in the affirmative. It held that the trial judge had "throughout the trial, exercised admirable self restraint before the jury" (App. A, p. 4). It held that the statements of the judge to the jury after their verdict were proper. "There can be no doubt the judge had at that time made up his mind about the conduct of defendant before the court of inquiry and before him. He had the right officially to express himself as to both. Because he had a firm opinion, based upon the evidence in the case and upon the action of the defendant before him, is the fault of defendant and not of the court" (App. A, p. 4). Indeed, the Court of Appeals expressed the view that the trial judge could properly have commented on the conduct of defendant during the trial before the jury, and that this failure to so comment "may have resulted in this result [the acquittal] which he [the judge] thought unjust" (App. A, p. 4).

The sentence imposed upon petitioner was thirty days' imprisonment [R. 2599]. The Court of Appeals, while affirming the findings of contempt, remanded the cause to the *same* trial judge for consideration of sentence. This was done, according to the *per curiam* opinion, because "a long time has passed since the judgment was rendered" and because "Shibley has been convicted of a criminal charge which was argued on appeal at the same time the instant case was argued" (App. A, p. 5).[6]

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[6]The Court of Appeals also denied a purported request of petitioner to dismiss the remaining counts of the information against him for contempt of the court of inquiry (App. A, p. 5). No such request appears to have been made in the briefs on appeal or in argument, the remaining counts having previously been dismissed by a Judge of the District Court early in 1954 on motion of the prosecutor.

The Time of the Summary Contempt Proceedings—Procedural Due Process.

The verdict of the jury was returned on November 20, 1953 [R. 2558]. After the castigation of jury and petitioner, the trial judge stated: "You will be here Monday morning at 10:00 o'clock and the court will take up at that time the matter of summary contempt" [R. 2562].

Petitioner appeared with his counsel on Monday, November 23, 1953 [R. 2566]. The court stated that it would continue on its own motion "the matter of summary contempt to Monday, December 7th, at 10:00 o'clock in this court" [R. 2575]. The court asserted that it wanted the reporter "to write up certain designated parts" of the record [R. 2574]. Counsel for petitioner inquired as to what portions of the record the court had in mind [R. 2574]. The court replied: "I haven't definitely determined what portions of the record" [R. 2574]. Counsel inquired if the petitioner would be furnished with a copy of the portions of the record which the court ordered transcribed [R. 2575]. "Not necessarily," replied the court. "Summary contempt is not based upon the record. The record is for the court's assistance, and a summary contempt will be based, *if one is found,* upon a certificate prepared by the court certifying as to what I saw and observed in the presence of the court" [R. 2575] (emphasis supplied). Counsel for petitioner stated that "it is our position that this is a 42(b) and not a 42(a) situation, and that we are entitled to all of the protection of 42(b)" [R. 2575]. Among the decisions cited to the court [R. 2576] were *Sacher v. United States,* 343 U. S. 1, and *Cooke v. United States,* 267 U. S. 517.[7]

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[7]The decision of this Court in *Offutt v. United States,* 348 U. S. 11, had not yet been rendered, but the decision did precede the opinion of the Court of Appeals below.

Petitioner appeared with his counsel on December 7 [R. 2580]. On its own motion, the court continued the summary contempt proceedings to "December 28, 10:00 o'clock in this court" [R. 2580]. ". . . the reporter has not yet completed preparing certain parts of the transcript" [R. 2580]. Counsel for petitioner submitted an affidavit of bias and prejudice [C. Tr. 642-57] and requested that the contempt proceedings be assigned "to another judge" [R. 2580]. The court stated that "I don't think it [the affidavit of bias and prejudice] has any bearing on the matter of summary contempt. However, I will look it over before the 28th" [R. 2581].

On December 28, 1953, petitioner was hospitalized in the Long Beach Veterans Administration Hospital and at his counsel's request the proceedings were continued [R. 2584-5]. The court set the date at January 18, 1954.

On January 18, 1954, petitioner appeared with his counsel. The Court stated: "Mr. Marshall, I have prepared a certificate for summary contempt, which I propose to file this morning" [R. 2587]. A copy was then served upon counsel for petitioner [R. 2587]. Counsel inquired if he could have time to read the certificate [R. 2588]. The Court: "I will give you 10 minutes" [R. 2588]. Counsel, after these ten minutes, stated that the court was without jurisdiction; objected to any further proceedings in the matter; maintained that the court was disqualified; and that petitioner was not ready to proceed in response to the certificate because there had not even been sufficient time to read it [R. 2590]. The Court stated: "I don't want to discuss the certificate at this time, and I now, having filed the certificate, find George E. Shibley, an attorney admitted to the Bar of this Court, in summary contempt of this Court. I am now ready to pass sentence on Mr. Shibley . . ." [R. 2591].

The Court of Appeals stated that the certificate of contempt "was entered on a date considerably postponed" (App. A, p. 1). The Court of Appeals added: "Shibley complains that the certificate was not filed until two months after the verdict. The delay is not important. Indeed, it indicates the trial judge was not acting inconsiderately, but with due deliberation. The fact that there was no hearing on the certificate and that due process was thus lacking is untenable. Such delay until after trial has been given formal approval by the courts" (App. A, p. 3), citing *"Offutt v. United States,* 348 U. S. 11; *MacInnis v. United States,* 9 Cir., 191 F. 2d 157, 161, certiorari denied 342 U. S. 953" (App. A, p. 3, n. 3).

The Contempt Certificate and the Evidence in the Record.

The "Certificate Re Contempt of George E. Shibley, An Attorney" [C. Tr. 670-85] contains 16 specifications. Apparently because of the trial judge's view that "summary contempt is not based upon the record" [R. 2575], the certificate is devoid of any page reference to the Reporter's Transcript of proceedings. The matter is further complicated by the trial judge's statement in the certificate "that an inspection of the entire record is necessary in order to see the nature and extent" of petitioner's alleged misconduct [C. Tr. 678].

It is the contention of petitioner that the evidence in the record does not support the judgment of contempt nor justify the imposition of the sentence of imprisonment imposed upon petitioner. 18 U. S. C. 401; Fed. Rules Crim. Proc., Rule 42(a). Since this requires an analysis of the evidence as well as the general conclusions

of law and fact contained in the certificate of contempt, and in order not to unduly lengthen this Statement of the Case, we have attached such analysis as an appendix to the petition herein (App. D). We merely summarize here the conclusions of fact in this case which, it is respectfully submitted, flow from this Analysis as related to the certificate of contempt.

1. There is no evidence in the record sufficient to support the certificate or judgment of contempt.

2. Petitioner, a member of the Bar, has been sentenced to a term of imprisonment for contempt of court under circumstances and for reasons irrelevant to the exercise of the drastic power exercised by the trial judge.

3. The judgment of contempt, made some months after the trial of the cause, appears to have been based upon a failure of the trial judge to recall the actual record and his contrary rulings and actions during the trial, the complexity of the issues, and the fact that many of the matters which the judge subsequently deemed contempt of court were only legal steps taken by petitioner as counsel and accused during the trial, and so considered by the judge during the trial.

4. The record does not reflect an intent on the part of petitioner to commit contempt of court, and petitioner's specific disclaimer of such intent at the time of imposition of sentence was not disputed by the trial judge.

5. The prerogatives of the court were duly exercised at the trial and the administration of justice was not obstructed. There was no disturbance or disorder during the trial, and no contention that petitioner's manner or demeanor was other than respectful.

6. The subsequent determination of the trial judge to impose a sentence for contempt of court was infused with such considerations as the belief that petitioner, an attorney, had been too persistent in his legal objections before the military officers at the court of inquiry; that petitioner was guilty of contempt of the military body and that justice had not been done by petitioner's acquittal in the District Court; and that the trial had not been expeditiously concluded because of petitioner's persistent legal contentions made during the trial.

The Court of Appeals held that "many of the recitals of the certificate might not state specific acts which were of themselves contemptuous" (App. A, p. 3), but it held that the petitioner had "abused his position as lawyer for himself as defendant" and "fairly succeeded in taking complete control of the trial" (App. A, p. 2). There is no reference in the opinion to any particular instance during the trial which allegedly supports the judgment of contempt, but the court below held that the trial judge properly imposed the sentence of imprisonment in summary contempt proceedings when he did because, contrary to the rulings and directions of the judge, petitioner allegedly persisted in bringing before the jury the merits of the case in which petitioner had been involved with the "Marine Corps officers" (App. A, p. 2). This is a paraphrase of the certificate of contempt [C. T. 670, 681, pars. II and X], but the evidence in the record as shown by the Analysis (App. D) does not support these conclusions. The Court of Appeals, while affirming the judgment of contempt, recognized the right of petitioner to "fearless, vigorous and effective advocacy" (App. A, p. 2).

ARGUMENT AND REASONS RELIED UPON FOR GRANTING THE WRIT.

A.

The Court of Appeals below has decided a federal question in a way in conflict with applicable decisions of this Court and so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

I.

The Trial Judge Was Not Qualified to Conduct These Summary Contempt Proceedings and the Court of Appeals Erred in Remanding the Case to the Same Trial Judge Solely for Reconsideration of Sentence.

The core of the trial judge's personal feelings to petitioner, as revealed by the record and the certificate, was this: the petitioner, a member of the Bar, had somehow succeeded in harassing and impeding the military court of inquiry and that petitioner during the trial below engaged in the same conduct with respect to the trial judge with the aim of delaying and impeding the trial. It seemed to the trial judge that the petitioner had not only "horsed around" with the military court (although the record presents an opposite picture), but that the petitioner had done the same with the trial judge.

From the outset of the trial, the trial judge appeared sympathetic to the apparent plight of the military officers, insisting that petitioner, *in camera* without counsel, had no "right to challenge anybody" [R. 194] and that petitioner had acted on some questionable advice by "certain members of the bar" [R. 195], a statement left unexplained in the record. As the evidence and certificate

of contempt reveal, legal objections were treated as "obstructionist tactics" [R. 332-3]; sarcasm was turned upon petitioner's legal arguments [R. 373, 1822]; accusations of "stalling" were constantly made [R. 789-805]; petitioner was advised it would be better to "toss in the sponge" if he continued "to perform as you are performing" [R. 806-7]; time and again petitioner was reminded that he had "ragged" the court in inquiry and tried "to make himself some kind of defendant in some kind of a proceeding" [R. 934, 1043-4, 2147]; and objections to the conduct of the trial by the judge were treated as personal reflections upon the court [R. 2544-5; C. Tr. 679, 679-80, 680, 681, 682]. Even an objection in no way directed to the judge was treated as an "Alice in Wonderland" argument [R. 2549] and a contempt of the court [C. Tr. 682].

Finally, the feelings of the trial judge were revealed full blown at the conclusion of the trial when the jury was told that their verdict was "a miscarriage of justice" and that the case was a simple one "after all the smoke was blown away"; when the jury was told to remain in their seats, and petitioner was castigated because he had accused "the officers in the Marine Corps of perjury," accused the prosecutor "of dishonesty," and "accused me" of delivering the instructions in a way which favored the prosecution [R. 2559-63]. Petitioner was charged with conducting himself "in a way ill fitting a lawyer in this court" [R. 2563].[8] It was on the basis of this record

[8]In the Court of Appeals, the United States conceded that the trial judge did "let off a little steam" (Br. p. 24) at the conclusion of the trial, but it argued that this was due to the fact that petitioner "was giving the trial court the same treatment which he gave the court of inquiry" (Br. p. 7) and because the trial judge "had to resist well planned and vigorous efforts to take the control of the case out of his hands" (Br. p. 7). It was these general arguments which were accepted by the Court of Appeals.

that the trial judge deemed himself qualified to conduct summary contempt proceedings and impose a sentence of imprisonment upon petitioner.

It is respectfully submitted that the record and the certificate of contempt indicate that the judgment of the trial judge became inextricably entangled with his subjective and personal feelings against petitioner and that the interests of justice required the removal of the contempt proceedings to an impartial tribunal. Since the judgment of the trial judge was so entangled, dominating the entire trial and culminating with the statements to petitioner before the jury, the trial judge was not legally qualified to render the judgment herein. *Offutt v. United States,* 348 U. S. 11; *Cooke v. United States,* 267 U. S. 517. See, the opinion of Justice Frankfurter in *Sacher v. United States,* 343 U. S. 1, 23, and the opinion of Chief Judge Denman for a unanimous court (Bone and Pope, JJ., concurring) in *Gladstein v. McLaughlin,* 230 F. 2d 762 (C. A. 9, 1955). The matter was specifically called to the trial judge's attention when the affidavit of personal bias and prejudice [C. Tr. 642-57] was filed with the court sometime prior to the imposition of sentence and after the court had indicated at the conclusion of the trial its view that contempt may have been committed [R. 2580]. See paragraph "XV" of the certificate of contempt [C. Tr. 683-4].

The Court of Appeals appears to have misconceived the issue involved here. The question is not whether the "firm opinion" of the trial judge was the "fault of defendant and not of the court" (App. A, p. 4), but "the real issue is whether under the decision of the *Cooke* case such a ruling should have been made by the trial judge, or whether for the very purpose of vindicating justice

for which the power of summary contempt is available, the *determination of petitioner's guilt* and *the punishment properly to be meted out on a finding of guilt* should have been made in the first instance by a judge not involved, as was this trial judge, in the petitioner's misconduct." *Offutt v. United States, supra,* p. 15 (emphasis supplied).

It is submitted that the decision of the court below is in conflict with the holding of this Court in *Offutt* and related holdings, and should be reviewed by this Court in the interests of justice and the fair administration of justice.

B.

The Court of Appeals below has decided a federal question in a way in conflict with the applicable decisions of this Court; has decided an important question of Federal law which has not been, but should be, settled by this Court; and has so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

II.

The Trial Judge Was Without Power or Jurisdiction to Conduct Summary Contempt Proceedings or Impose Punishment Therein Almost Two Months After the Termination of the Trial and Petitioner Was Thus Deprived of His Liberty Without Due Process of Law Contrary to Law and the Due Process Provisions of the Fifth Amendment.

It is respectfully submitted that the trial judge was without jurisdiction or power to conduct or punish petitioner in summary contempt proceedings under Rule 42(a) thirty-eight to fifty-eight days after the conclusion of the

trial [R. 2562, 2575, 2580, 2584, 2587]. Nothing in the decisions of this Court indicate that a power exists to summarily punish an alleged contempt committed during a trial at some undefined time long after the conclusion of the trial. The most that has been held is "that if he [the judge] believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power." *Sacher v. United States,* 343 U. S. 1, 11. The cases are clear, however, in the light of the history of the Contempt Statute, that the jurisdiction is exhausted when the exercise of the power is postponed beyond the termination of the trial. There is danger in sanctioning any lax, importunate exercise of such drastic power. See, *Nye v. United States,* 267 U. S. 517; *Pendergast v. United States,* 317 U. S. 42; *In re Oliver,* 333 U. S. 257; *Sacher v. United States,* 343 U. S. 1; *Hallinan v. United States,* 182 F. 2d 880 (C. A. 9, 1950); *MacInnis v. United States,* 191 F. 2d 157 (C. A. 9, 1950); 37 Cornell L. Quarterly 795 (1952); 24 Mississippi L. J. 245 (1953).

Even in *Sacher,* the United States conceded "that a judge could not summarily punish contempt without notice and hearing at any undefined time long after it has occurred in his presence" (p. 29). The unique issue presented here is this: Ordinarily the question arises as to whether an "exigency" or "overriding consideration" required the court to postpone punishment for summary contempt from the time it was observed during the trial to the termination thereof; here the issue is whether, the trial having been concluded, the court could still postpone summary contempt proceedings until months later. It is submitted that no reason can justify such postponement of proceedings which strip an accused of all

procedural safeguards including the right to trial by jury. Clearly, no "exigency" existed here. The only procedure under such circumstances should be notice and hearing before an impartial tribunal.

The dangers which lurk in adopting any other rule is exemplified in this case. Here, after the trial, the judge wanted time to have some portions of the record transcribed. The balance of the record depended solely on his recollection. Three days after the conclusion of the trial, the judge stated he wanted to examine certain portions of the record to determine whether a contempt should be found [R. 2575]. It was not until about two months after the completion of the trial that the judge advised petitioner as to what his contempt had been. Based upon a past recollection, a recollection which largely overlooked the actual record, a punitive sentence was imposed without a semblance of procedural due process.

The infirmities in the proceedings appear plain. The Court of Appeals held that the delay was "not important," that the absence of a hearing and the lack of due process was sanctioned by the decisions of this Court in *Offutt* and the denial of certiorari in *MacInnis*. Since these rulings do not appear to give support to the holding of the court below, and indeed are opposed thereto in principle, this Court should grant review to settle a question which looms large in the administration of summary contempt proceedings in the federal courts.

C.

The Court of Appeals below has so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

III.

The Certificate and Judgment of Contempt Examined in the Light of the Evidence in the Record Were Insufficient to Warrant the Exercise of the Contempt Power by the Trial Judge.

The stigma of contempt and the severe penalty of imprisonment have been imposed upon petitioner, an attorney, without consideration of the actual evidence in the record. More than 50% of the certificate of contempt is made up of general conclusions of law and fact. See Specifications I, II, III, IV, XII, XV, XVI [C. Tr. 670-8, 682, 683-5]. Most of the remaining specifications appear to be only counsel's objections to the rulings or conduct of the trial judge which it was claimed were prejudicial to petitioner's defense. See Specifications VI, VII, VIII, XI, XIII [C. Tr. 679-80, 681-2]. One specification did not involve the trial judge at all. See Specification XIV [C. Tr. 683]. All of the specifications in the certificate, when examined in the light of the actual record, show no contempt of the authority of the court, but the expeditious trial of a complex cause, vigorously contested by counsel for both sides and actively participated in by the trial judge. See Appendix D.

It is submitted that there is a great risk to impartial justice if this judgment of contempt is left unreviewed. The contempt power exercised here should be examined in the setting of the history and policy of the Contempt Statute (*Cammer v. United States*, 350 U. S. 399), and when so examined will be found to have been improvidently used. The certificate of contempt does not actually recite "the facts" as required by Rule 42(a), and the evidence does not establish a contempt of the court's "authority" nor an obstruction of the administration of justice as

set forth in 18 U. S. C. 401. "I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words." Holmes, J., in *Toledo Newspaper Co. v. United States,* 247 U. S. 402, 425.

Since in the Statement of the Case herein, petitioner has summarized the conclusions of fact flowing from a review of the evidence contained in Appendix D, we refer here only to the rules of law which the courts below appear to have disregarded in imposing the punishment of contempt upon petitioner.

1. Punishment in summary contempt proceeding requires the support of a "solidity of evidence." *Pennekamp v. Florida,* 328 U. S. 331, 347.

2. Where there is no proof that petitioner ever violated a direct order of the court, mere general allegations that objections were too "wordy" or "rambling" or "needless" or "repetitious" should not invoke the contempt power, if the rights of litigants and the independence of the Bar are to be preserved. See, *Caldwell v. United States,* 28 F. 2d 684 (C. A. 9, 1928).

3. "Offers of proof" are often required to be made by counsel if the record on appeal is to be preserved and the rights of litigants protected. *Steinberg v. United States,* 162 F. 2d 120, 123 (C. A. 5, 1947). *Cf. Benatar v. United States,* 209 F. 2d 734, 742-5 (C. A. 9, 1954).

4. Actions taken by counsel during the course of trial, even under a mistaken view of the law, do not constitute a contempt of court. *Sprinkle v. Davis,* 111 F. 2d 925, 930 (C. A. 4, 1940).

5. An assertion that a trial judge's ruling during the trial does not give the appearance of impartiality is not a contempt of the court. *Cf., Whitaker v. McLean,* 118 F. 2d 596 (C. A. D. C. 1941).

6. It is not a contempt of court to point out that the trial judge appeared to emphasize only certain portions of the instructions. *Northwestern Mut. Life Ins. Co. v. Stevens,* 71 Fed. 258, 264 (C. A. 8, 1895). *Cf., Smith v. United States,* 230 F. 2d 935 (C. A. 6, 1956).

7. Time may be precious to a court, and the due administration of justice essential, but the interests of justice are also served by an independent Bar and a judicial trial in which the truth is patiently sifted out from falsehood and the liberties of an individual substantially protected. *Offutt v. United States,* 348 U. S. 11; *Powell v. Alabama,* 287 U. S. 45; *Gallagher v. Municipal Court,* 31 Cal. 2d 784, 797, 192 P. 2d 905; Cooley, *Const. Lim.* (8th Ed., 1927), Vol. I, p. 704; Oswald, *Contempt of Court* (1911), p. 54.

This Court has held in both *Sacher* and *Offutt* that while the fair administration of justice requires an orderly trial, still the drastic power of contempt should not be used to limit fearless, vigorous and effective advocacy, if the independence of the Bar and the liberty of the individual are to be preserved. Although this Court has drawn the line in principle, it has not considered the application of the principle to a particular state of facts. It is submitted that the case herein presents a situation in which the line has been seriously overstepped, and constitutes an unprecedented use of the contempt power under circumstances which threaten the fundamentals of a fair trial and the search for justice. This case, as well as the

case in No. 243, moreover, appear to reflect a disturbing insistence by military officials for the imposition of penal sanctions upon civilian counsel successfully engaged in defense of military personnel which requires critical examination of this Court. Review is important, therefore, not only for this petitioner, but for all attorneys and agencies of government concerned with the administration of military justice and criminal justice in the federal courts.

Conclusion.

The petition for a writ of certiorari should be granted, the writ issued, and the judgment of contempt reversed.

Respectfully submitted,

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APPENDIX A.

Opinion of the Court Below.

United States Court of Appeals for the Ninth Circuit.

George E. Shibley, Appellant, vs. United States of America, Appellee. No. 14,464.

June 18, 1956.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS, FEE and CHAMBERS, Circuit Judges.

PER CURIAM:

During the trial of defendant, who is a lawyer, on several counts of contempt alleged to have been committed before a United States Marine Corps Court of Inquiry,[1] the United States District Judge warned Shibley, who was acting as attorney in his own defense, that he was contemptuous of the District Court. After verdict, the trial judge ordered the matter of summary contempt to be brought before the court at a later date. A Certificate of Contempt of George E. Shibley was entered on a date considerably postponed,[2] and, based thereon, the trial court adjudged Shibley guilty and sentenced him to imprisonment for thirty days.

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[1]See United States v. Shibley, 112 F. Supp. 734.

[2]The trial was concluded on November 20, 1953, at which time the court ordered the matter of summary contempt be brought before the court on November 23, 1953. At that time, the matter was postponed to December 7, 1953, and then again to December 28, 1953, for the reason that the reporter had been unable to transcribe completely the important portions of the voluminous record. On the twenty-eighth, the matter was again postponed at the behest of appellant because of illness until January 18, 1954, at which time the certificate was filed and appellant sentenced.

The Certificate of Contempt is a voluminous document based upon actions, words and conduct of Shibley, an attorney, in open court, which were heard, seen and observed by the trial judge presiding, according to the declarations therein contained.

The record bears out the statements of the certificate in essential particulars. The evidence was amply sufficient to sustain the charges.

There is no question but that Shibley abused his position as lawyer for himself as defendant. He consistently spoke and acted with complete contempt of the court. He attempted to and fairly succeeded in taking complete control of the trial, because of the attempt of the trial judge to act as an impartial arbiter and because the trial judge refrained from criticizing the conduct of Shibley before the jury as far as possible. Specifically, Shibley, continuously and contrary to the rulings and directions of the judge, insisted on bringing before the trial jury, in opening statement and other places during presentation of evidence and in final arguments, the merits of the case in which Shibley had represented one Babette before a Marine Corps court-martial, charges which Shibley had made against Marine Corps officers on which the Court of Inquiry had been convened, and constantly ignored directions and rulings of the court.

Shibley has not the excuse in this instance that he, as a lawyer, was misled by zeal in attempting to do his duty to his client. We hold that many of the acts set up in the certificate were in contempt of court. It would be a

travesty to hold that the right of an accused to "fearless, vigorous and effective advocacy," no matter how unpopular the cause, justified the contemptuous behavior of Shibley in his own behalf.

Many of the recitals of the certificate might not state specific acts which were of themselves contemptuous, but they give color and emphasize the necessity of the judgment as to the particulars of conduct recited.

Shibley complains that the certificate was not filed until two months after the verdict. This delay is not important. Indeed, it indicates the trial judge was not acting inconsiderately, but with due deliberation. The fact that there was no hearing on the certificate and that due process was thus lacking is untenable. Such delay until after trial has been given formal approval by the courts.[3] Nevertheless, such delay has its danger, as has been pointed out. If there is a conviction, then a subsequent penalty for contempt appears to the unthinking as a cumulative and vindictive punishment. But where there is a verdict of "not guilty," as in this case, the charge can always be made, as it has by the lawyer defendant here, that the trial judge was disappointed at the verdict and therefore assessed a punishment for contempt. But the record here, cold as it is, is replete with evidence of such utterly contemptuous conduct that a trial judge would have been recreant to his duty if he had failed to notice the assault upon the dignity of the tribunal, whatever the verdict

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[3]Offutt v. United States, 348 U. S. 11; MacInnis v. United States, 9 Cir., 191 F. 2d 157, 161, certiorari denied 342 U. S. 953.

were. Although, in our opinion, this might well have been done early in the trial, the action then might have required a mistrial. Here there is the advantage of tabulation of a cold, consistent, calculated design to influence the jury by utterly extraneous matter, which was in the main successful. This lawyer defendant is brazenly citing the success of his contemptuous behavior as a reason for relieving him of its consequences.

It is also suggested that, since the trial judge, after verdict had been rendered and the jury discharged from consideration thereof, had in the presence of the jury expressed his opinion of the conduct of defendant at the Court of Inquiry and of the failure to bring in a verdict of guilty, he was then biased and could not enter the certificate. There is nothing to this contention. The trial judge, throughout the trial, exercised admirable self restraint before the jury. He would have had a perfect right to comment on the evidence during instruction if he did so fairly. The fact that he did not and refrained from an expression to the jury of the conduct of defendant during the trial may have resulted in this result which he thought unjust. He had a right to say he thought so. There can be no doubt the judge had at that time made up his mind about the conduct of defendant before the Court of Inquiry and before him. He had the right officially to express himself as to both. Because he had a firm opinion, based upon the evidence in the case and upon the action of defendant before him, is the fault of defendant and not of the court.

This Court therefore affirms the judgment that Shibley was guilty of contempt. However, a long time has passed since the judgment was rendered. Meantime, Shibley has been convicted of a criminal charge which was argued on appeal at the same time the instant case was argued.[4] Several counts of the original information have not yet been determined by a jury. This Court has no control over the penalty, which is entirely in the discretion of the trial court.[5] It is the opinion of this Court that, without expressing any opinion as to the ultimate result, the cause should be remanded to permit the trial judge to consider the sentence in view of the conditions which now exist.

We deny the request of Shibley to dismiss the remaining counts of the information against him for contempt of the Court of Inquiry.

Remanded for consideration of sentence.

(Endorsed:) Per Curiam Opinion. Filed June 18, 1956. Paul P. O'Brien, Clerk.

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[4]See Shibley v. United States, 9 Cir., ... F. 2d ..... (No. 14,465, filed March 19, 1956).

[5]MacInnis v. United States, 9 Cir., *supra*, at p. 162.

APPENDIX B.

Judgment of the Court Below.

United States Court of Appeals for the Ninth Circuit.

George E. Shibley, Appellant, vs. United States of American, Appellee. No. 14,464.

JUDGMENT.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause that Shibley was guilty of contempt, be, and hereby is affirmed, and that this cause be, and hereby is remanded to the said District Court to permit the trial judge to consider the sentence in view of the conditions which now exist.

(Endorsed) Judgment. Filed and Entered: June 18, 1956. Paul P. O'Brien, Clerk.

APPENDIX C.

Statutes Involved.

A. Title 18, U. S. C., Section 401:

"POWER OF COURT.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701."

B. Rule 42, Federal Rules of Criminal Procedure:

"CRIMINAL CONTEMPT.

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constitut-

ing the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except, with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

APPENDIX D.

The certificate of contempt [C. Tr. 670-85] contains 16 specifications. There are no record references. It is important to note that the certificate was prepared some time after trial [C. Tr. 670], that the trial judge ordered only small portions of the record transcribed [R. 2574], and that in the main the general conclusions set forth in the certificate were based upon a recollection of past events infused with the trial judge's overt disappointment at the result of the trial.

SPECIFICATION "I" [C. Tr. 670].

Here it is stated that the trial judge relies on the series of alleged contempts set forth in "Paragraphs IV to XIV" [C. Tr. 670].

SPECIFICATION "II" [C. Tr. 670-7].

A. Although this specification covers more than one-half of the certificate, it has not been charged as a contempt, as the first specification above indicates. The Court of Appeals stated that specifications such as these give "color and emphasize the necessity of the judgment as to the particulars of conduct recited" (App. A, p. 3). When a trial judge, however, announces at the termination of a trial that he believes a contempt was committed, and in subsequent weeks searches solely his memory to fortify his conclusions, the danger exists that those matters which rise to the surface may take on an appearance wholly inconsistent with the actual record.

The core of Specification "II" is the trial judge's retrospective view that the trial consumed "approximately 17 trial days" when it could have been otherwise tried "in not exceeding 4 to 6 days" [C. Tr. 677]. When the trial

judge imposed the sentence of imprisonment upon petitioner two months after the trial, he stated. "This case should have been tried in eight days, eight trial days, 10 at the outside" [R. 2572]. During the trial, the trial judge stated to the jury [R. 1119]:

> "I want to say this further. We have had a lot of delays in this case, but the case is a novel case, in that we have a new military code of justice, a Uniform Code of Military Justice, that has been passed by Congress, we have regulations which have the effect of law which have been put into effect by the Secretaries of our armed forces, and the President of the United States, and whenever you get a case that involves a new field of law you have problems, problems that concern legal principles. So this case is not a case like a simple assault and battery, where you try out the question of whether somebody hit somebody and whether they had justification for doing it.
>
> As a result, the court has had to determine on its own, in your absence, various questions of law, and has from time to time determined what part of the case you may hear. So let's understand that it is an intricate case involving many interesting problems."

The retrospective decision of the trial judge to place the onus for the alleged delay in the trial upon the petitioner is without support in the record. The first eight days of the trial on this nine-count information were consumed by the prosecution's case [R. 1-1022]. Motions to dismiss, selection of the jury, opening statements all took place on the first day [R. 1-173]. The second day was opened by the trial judge with a tenative view of "how this case will be tried" [R. 181-91], with both sides then being asked to express their views [R. 193-252]. The

same day the prosecution called its first witness, and the trial judge ruled that the witness' testimony should not be in the presence of the jury [R. 248]. Direct and cross-examination followed [R. 290-9, 310-65]. On the third day, the trial judge adjourned the trial at noon on his own motion [R. 375], also stating that he had changed his position and that the testimony of the first prosecution witness would have to be before the jury [R. 371]. On the fourth day, therefore, all the testimony of the witness had to be retraced before the jury, and examination continued [R. 379-517]. On the fifth day, the first witness concluded and the second prosecution witness was called to testify [R. 522-605, 625-37]. There were also proceedings on a *subpoena duces tecum* and another witness called out of order [R. 637-57]. On the sixth day, the second prosecution witness concluded, and a third began to testify [R. 676-805]. On the seventh day, the examination of witnesses was concluded in the middle of the day, when the prosecution sought to rest [R. 850]. The trial judge stated: "You are not ready to rest until some part of the transcript is before the jury. It raises the question as to what portion of the transcript should go before the jury" [R. 850]. Then followed discussion at the trial judge's request [R. 852-937]. On the eighth day, the prosecution rested, the trial judge having first read lengthy excerpts from the exhibits to the jury [R. 988-1022]. The certificate of contempt, as aforesaid, recites that the *entire* trial should have been concluded between *four and six days.*

On the ninth day, the petitioner's first witness took the stand [R. 1080]. The testimony was cut off by the trial judge, and an offer of proof was made [R. 1083-6, 1093-6]. The second witness was called the same day [R.

1099], and before the witness started to testify, the trial judge called for an offer of proof in chambers which was rejected [R. 1099-1117]. The court having indicated that it wanted an offer of proof before the next witness was called, such offer was made [R. 1121-2]. The witness was rejected [R. 1152], and the judge called for an offer of proof on the fourth witness [R. 1153-62], which was again rejected [R. 1162]. An offer of proof with respect to a fifth witness [R. 1168-78] was also denied [R. 1178]. On the tenth day, petitioner's expert witness testified on the discrepancies in the transcript of the court of inquiry [R. 1187-1225]. On the same day, petitioner took the stand to testify in his own behalf [R. 1225]. Petitioner was on the stand, direct and cross, on the eleventh day [R. 1330, 1445]. On the twelfth day, there was continued cross, redirect and recross [R. 1495, 1510, 1514]. Subject to certain matters to be submitted out of the presence of the jury, the petitioner rested [R. 1552]. Thus, the prosecution case had taken eight days; the petitioner's case reduced by the trial judge to four.

On the thirteenth day, the prosecution called rebuttal witnesses [R. 1598, 1718, 1743]. On the fourteenth day, a witness, a sound engineer, testified for petitioner [R. 1771] and some excerpts from the original sound belts involving the transcript were read. The petitioner testified briefly thereafter [R. 1915-33]. The prosecution rested [R. 1944]. The fifteenth day was devoted to discussion of instructions in chambers [R. 1952]. The sixteenth day continued with discussion of instructions and other related legal matters [R. 2058]. Summations were made on the seventeenth day [R. 2260, 2285]. Instructions were given on the eighteenth day [R. 2422-65]. The jury retired [R. 2479], and returned with their verdict of acquittal the next day [R. 2558].

It should also be noted that in most of this record aforesaid, petitioner did not participate at all. The trial judge, prosecutor and petitioner's associate counsel were active participants in the trial. The trial, it is submitted, was not impede or delayed by petitioner and was expeditiously tried. There is not the slightest evidence, in the actual record, that justice was obstructed.

B. The certificate alleges, apparently as an example of the reason for the purported delay in the trial, that a motion to dismiss the information was made prior to trial before another District Judge, and denied [C. Tr. 671]; that the trial judge ruled repeatedly that the pre-trial ruling would be followed, that the matters were binding on the trial judge and would not be reargued or reconsidered [C. Tr. 671-2].* Here is what the actual record shows:

> "The Court: Well, I will ask both counsel over the weekend to do some work on this, and I think our discussion this afternoon has pointed up the problem.
>
> I certainly don't know the answer. But, Mr. Deutz [the prosecutor], it is not a problem that you can snuff off easily and say, 'There is no merit to it.' It presents a nice question. ***And with all respect to Judge Yankwich, who said his decision would settle all the problems in the case, I am afraid that it didn't.***

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*The decision on the motion to dismiss prior to trial is reported in 112 F. Supp. 734. The opinion was based on a misconception of the facts, as the subsequent trial revealed. The District Court treated petitioner's charges against the military officers as some attack on a court-martial when actually the charges were made during a pre-trial investigation and before any military court was convened. The ruling that petitioner's privileges were waived as a matter of law, however doubtful this position may have been legally, depended in any event on a factual showing at the trial, as the trial judge later recognized.

Mr. Marshall: It didn't obviously.

The Court: *Because it was on a motion to dismiss and it wasn't on the trial of the case"* [R. 726-7]. (Emphasis supplied.)

C. Another instance furnished in the certificate of contempt for the alleged delay in the trial is the matter of petitioner appearing as his own counsel. It is alleged that petitioner first appeared as his own counsel at the beginning of the trial when the trial judge would not permit petitioner to have associate counsel, but that petitioner's objections and motions were so "voluminous, wordy, rambling, repetitious and far-fetched" [C. Tr. 672], that the trial judge reconsidered his ruling and permitted Mr. Daniel G. Marshall to act as associate counsel.

The evidence in the record does not support the conclusion contained in the certificate. At the very beginning of the trial, the petitioner appeared as counsel for himself in association with Mr. Marshall. The trial judge demurred: "He can defend himself or he can have an attorney, but he can't do both. . . . I call your attention, also to the old axiom that a man who is his own attorney has a fool for a client" [R. 34-5]. Petitioner explained why he was then compelled to appear for himself [R. 36-7], stated to the court that he was not familiar with the rules of procedure in the federal court, and the trial judge stated that "we will see that you protect your record" [R. 37].

Petitioner was thus compelled to appear for himself, but in the period when he was not permitted to have associate counsel there does not appear to have been any delay in the trial because of petitioner's objections or motions, as the certificate of contempt indicates. The first

day of the trial saw the selection of the jury [R. 41-116], a discussion in chambers concerning the exclusion of witnesses [R. 127-40], and the opening statements to the jury [R. 140-75]. The second day of the trial witnessed the trial judge's initiation of a legal discussion as to how the case was to be tried [R. 181-91]. Both the prosecution and the petitioner, at the court's invitation, participated in the discussion [R. 193-247]. Then came the calling of the first prosecution witness and the ruling by the trial judge that the witness' testimony would be out of the presence of the jury [R. 248-99]. At the opening of the trial the next day, the trial judge voluntarily stated: "I am going to permit Mr. Marshall to participate as counsel . . . The case is complicated here because the defendant is in pro per, and he is also a lawyer . . . I think it might assist Mr Shibley and might assist the court to have Mr. Marshall's participation. . . . Does that meet with your approval . . . Is that what you want?" [R. 308-9]. Thus, only the first two days of the trial were marked by petitioner's appearance solely as his own counsel and patently there was no delay in the trial because of petitioner. Actually, almost one-half of the transcript of the proceedings of these two first days was consumed without petitioner's participation at all [R. 1-303].

D. Having thus permitted petitioner to be associated with counsel, as aforesaid, the trial judge in retrospect appears to adopt the view in the certificate of contempt that it was inappropriate for petitioner to participate thereafter. It is stated that the trial judge advised petitioner that "he was creating a record of such size and length that if convicted he might be financially unable to pay for the transcribing and printing of a record on ap-

peal" [C. Tr. 673], but that "notwithstanding such advice and caution by the court, defendant George E. Shibley continued to actively participate in the trial and to continue with objections, contentions and arguments as stated above" [C. Tr. 673]. It is, of course, nowhere asserted that petitioner participated in the trial without consent of the trial judge; the vice appears to be that petitioner participated too fully.

The evidence in the record presents a different picture. The so-called "advice and caution" was given to petitioner on the ninth day of the trial [R. 1162]. It came after a rejection of an offer of proof by petitioner, as witness after witness for the defense was denied the right to testify. Much of Specification II [C. Tr. 673-7] deals with the retrospective recollection of the trial judge that petitioner's objections and offers of proof were "needless" and "unnecessary." Yet, the very offer of proof which elicited the court's impatient "advice" came as a result of the trial judge's own invitation. "In view of what has happened on your first three witnesses [none had been permitted to testify], I think it is only fair that I request a general statement of what you expect to prove by the next witness you call" [R. 1150]. The trial judge cautioned counsel during the trial to be careful in their offers of proof: "I submit, to perfect your record, you have to show that you desire or made an offer that these privileges, which you say raises questions of fact, be given to the jury" [R. 1474]. At the very inception of the trial, the court admonished petitioner to watch his record. "We will see that you protect your record. It is only fair that a record be made, . . . that your record is preserved" [R. 37]. At another point in the trial, petitioner's counsel offered to prove certain legal advice petitioner had re-

ceived from Judge Robert Walker Kenny relative to petitioner's legal rights before the military court of inqury [R. 1121-3]. The offer of proof was rejected [R. 1123-32]. Two days later, the court on its own initiative stated: "There still is the question of whether Kenny's testimony might be admissible on some other theory, and maybe I slammed the door too fast and too hard" [R. 1405].

It is submitted from all the aforesaid that Specification II not only fails to reveal any contempt of court, but the actual evidence in the record which the courts below appear to have overlooked in no way gives "color" or "emphasizes the necessity" of the judgment of contempt herein. The actual record shows that the limited participation of petitioner in the trial was not a cause for its alleged delay; that the case was in fact expeditiously tried; that the case was an "intricate" one as the trial judge stated during the trial and as revealed in his instructions [R. 2422-65]; that the litigation was vigorously and properly contested by both sides; that justice was done with the return of the verdict; and that no cause existed for the post-trial invocation of the drastic contempt power in summary proceedings.

SPECIFICATION "III" [C. Tr. 677].

This is another specification which the trial judge did not specify as a "criminal contempt." It contains no facts. The conclusions of law merely state generally that the contempts alleged in specifications "IV" to "XIV" were done with a wilful state of mind. Petitioner at the time of imposition of sentence in January, 1954, disclaimed any intention to be in contempt of court and reminded the court of his respectful demeanor and conduct through-

out the trial [R. 2593-7]. This was not disputed by the trial judge: "Why you did it is hard to understand . . . if lawsuits were permitted to be conducted as you attempted to conduct a lawsuit in this court . . . you wouldn't have fair verdicts . . . I take into account . . . that you had gone through a lot of mental turmoil" [R. 2598]. During the trial, as the trial judge appeared to overlook, there had never been an adjudication of such wilful misconduct.

SPECIFICATION "IV" [C. Tr. 677-78].

Again, this first "particular conduct" which the certificate describes as a "contempt" contains no facts at all. It is again alleged generally that petitioner's motions, objections and offers of proof were "repetitious, unnecessary and improper," and that petitioner delayed and impeded the trial and "interfered with administration of justice by such conduct." Instead of a recital of facts to support these conclusions, the specification concludes with the statement that "an inspection of the entire record is necessary in order to see the nature and extent of such conduct" [C. Tr. 678]. These charges, made at large, are not consistent with the requirements of Rule 42(a) or 18 U. S. C. 401. In a summary contempt proceeding, the trial judge who metes out the punishment is usually the injured party and the prosecutor as well. Essential fairness requires under such circumstances that a certificate of contempt recite in detail the facts constituting the alleged misconduct rather than the bare conclusions of the trial judge.

SPECIFICATION "V" [C. Tr. 678-9].

This is the first specification to state any facts at all. It is alleged that one of the prosecution witnesses, "Lt.

Col. Anderson," was on the stand when cross-examination started at 4:10 p. m. "The examination in chief had been very brief and limited to only one or two matters" [C. Tr. 678]. Petitioner allegedly began a course of conduct "aimed at delaying and impeding the trial" [C. Tr. 678]. It is alleged that petitioner looked at the clock, asked questions, withdrew questions, asked that questions be reread, asked questions "to which objections were sustained" because "outside the scope of direct examination" and made "long and wordy speeches and arguments." It is alleged that petitioner continued to delay the examination although "repeatedly" ordered to proceed and complete the cross-examination. The court, it is stated, advised petitioner that the examination would be completed even if it went beyond 4:30 p. m. (the usual adjournment time), but petitioner stated that he was "inadequate" and engaged in an "emotional scene" before the jury, and the court adjourned for the day.

The evidence in the record is quite to the contrary, it is respectfully submitted. Lieutenant Colonel Earl E. Anderson [R. 786] was not a routine witness. He had been counsel to the military court of inquiry; had been the person who prepared and served the subpoena on petitioner while petitioner was engaged in the Bennette court-martial proceedings; had tendered petitioner the alleged witness and mileage fees, and was familiar with the events which involved petitioner's claim that he had been excused from further attendance at the court of inquiry on two occasions.*

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*This latter issue, covering a number of counts of the information, was important at the trial, as witness the trial judge's instructions [R. 2448-51, 2453-58].

As to the assertion that the direct examination of this witness had been "very brief and limited to only one or two matters," here is the record: The witness having been sworn, the prosecutor asked to have three exhibits marked for identification, 7, 8 and 9 [R. 7861-7]. The first exhibit appeared to be the original subpoena. The other two appeared to have just been received by the prosecutor by "airmail," and petitioner inquired if these two "could be deferred until Mr. Marshall is here tomorrow morning" [R. 787]. The trial judge agreed that the offer of the two exhibits should be postponed "until tomorrow morning" [R. 788]. Mr. Marshall had been excused, as stated by the court in the certificate, from attendance at the trial for that day. The witness then described his background [R. 789]. He was asked if he served the subpoena upon petitioner; shown the original document; asked if there was a "certification" on the document; who had made the certification; whether he recognized the signature of the certifying officer as well as his own; whether he had served a copy upon petitioner; and whether he had paid witness fees to petitioner [R. 789-91]. The Colonel described the fees he had paid petitioner, the amount of witness fees and the amount of mileage fees [R. 791]. The trial judge inquired of petitioner if there was any contention that the proper mileage had not been paid [R. 791]. Petitioner stated that he had never tried to figure it. "May I reserve that question until Mr. Marshall comes in" [R. 791]. The court then promulgated a series of questions to the witness on the issue of mileage fees [R. 791].

Still continuing with the same witness on direct, the prosecutor showed the witness two other exhibits, 1-A and 2 [R. 791]. These were, respectively, the original

transcript of the court of inquiry and the partial transcript certified by the military to the United States Attorney. The witness was asked to identify his signature on each document [R. 792]. This authentication was made necessary by the strict requirements of the Uniform Code of Military Justice, 50 U. S. C. 731(h). The prosecutor then offered the original subpoena in evidence [R. 792]. Petitioner stated (it was now about 4:10 p. m.). "I wonder, your Honor, if all these matters could be deferred until morning? I really don't know any of the technicalities about this. I think Mr. Marshall is acquainted with it, and I would appreciate his being here" [R. 793]. The trial judge asked the witness: "Will you be back tomorrow morning, Colonel?" [R. 793]. The witness answered: "Yes sir." The Court: "All right. Renew your offer tomorrow, Mr. Deutz." [R. 793]. The trial judge inquired if petitioner would like to cross-examine the witness and petitioner replied that he would [R. 793].

This was the "very brief and limited" direct examination referred to in the certificate of contempt. It should be noted that the examination had proceeded without a single objection interposed by petitioner [R. 789-93].

The cross-examination of the witness began by a question as to whether the certification of the transcript [Ex. 1-A] was, to the witness' knowledge, true and correct [R. 794]. *This was the first question by petitioner.* Here is what occurred: "The Court: Now, Mr. Deutz [the prosecutor], that is just exactly what I anticipated when I asked you what you were going to ask this witness. . . . I will entertain a motion to strike. . . . I am not going to open up for cross-examination this entire line of questioning. . . ." [R. 794]. "Mr. Deutz: I so move. . . . The Government's motion

is that as to Exhibits 1-A and 2, that the testimony be stricken as to identification of signatures" [R. 794]. "The Court: Any objection to that, Mr. Shibley?" [R. 794]. "Mr. Shibley: I think Mr. Deutz, Government counsel, having done that, that I respectfully urge that it is prejudicial for the Court to move to have it stricken, simply to deprive the defendant of cross-examining Col. Anderson" [R. 794]. "The Court: . . . I have other business to attend to, Mr. Shibley. We have jurors here who have left their business to attend here, as a civic duty . . . and I don't anticipate that further cross-examination as to this record will be in the interests of justice or would be of any assistance to you. In fact, to the contrary, I think it might be of advantage to yourself in not having the record further encumbered with cross-examination on this record. . . ." [R. 795].

All of this was before the jury. Petitioner had asked only one question, a proper one as the trial judge recognized. Petitioner uttered not one retorting word after the lengthy remarks of the judge [R. 795-6]. Petitioner inquired as to what issues were left other than identification of the witness and his background [R. 796]. The trial judge replied that there remained "his identification of the subpoena, Exhibit 7, and his testimony as to serving it" [R. 796]. The examination proceeded solely on those issues [R. 796-802]. Only one question appears to have been reread and withdrawn [R. 797]. There were two objections by the prosecutor, both overruled [R. 796-801].

In the light of the aforesaid, it is plain that the conclusions recited in the certificate are in conflict with the actual record, undoubtedly due to the trial judge's reliance solely on a recollection invoked months after the

trial. Petitioner's opportunity for cross-examination could not have comprised more than 10 or 15 minutes and he had no reason to seek delay since the trial court normally adjourned at 4:30 p. m. and the judge, counsel and witness all understood that the examination would continue the next day. If there were involuntary glances at the clock in the courtroom as the trial day came to its conclusion, there appears to be no basis to infer from such glances a deliberate intent to obstruct justice, when the record reflects no attempt by the petitioner to delay his examination nor any reason for doing so.

It is true that at about 4:30 p. m., the Court suddenly stated: "We are going to continue this evening until we conclude this cross-examination, Mr. Shibley" [R. 802]. Petitioner stated, then, that "in order not to inconvenience the court" he had proceeded in the absence of associate counsel, but that he had had little sleep during the past weekend and in the light of his physical condition, he thought perhaps time could be saved if he had a night's rest.* Petitioner stated that he would like the advice of associate counsel who had been excused for the day, in order to avoid doing anything prejudicial to petitioner's cause [R. 803]. Petitioner also pointed out to the court that in the light of the prior remarks by the court in the presence of the jury about the needlessness of further cross-examination, petitioner did not wish to appear to be imposing on the jury [R. 803]. He stated that he frankly felt inadequate to proceed without the advice of counsel and would forego his cross-examination over

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*Petitioner is a disabled war veteran. The court was familiar with his condition prior to trial [C. Tr. 264-72]. Petitioner was hospitalized soon after the trial [R. 2584]. The trial judge at the imposition of sentence recognized that the statements of ill-health were made in good faith [R. 2598].

objection [R. 804]. The trial judge then stated that it had not intended to fix any limit on petitioner's cross-examination and court was adjourned [R. 804-5].

The record does not show "any emotional scene before the jury" [C. Tr. 679], except perhaps as reference to one's state of health may be impatiently equated with "emotion." The next day the trial judge permitted associate counsel, as petitioner had requested, to continue cross-examination [R. 816]. The judge stated to the jury: "Any man who defends himself labors under a disadvantage, and I think it is only fair to permit Mr. Marshall to conduct cross-examination this morning, . . ." [R. 817].

It is submitted that specification "V", examined in the light of the record, fails to establish a contempt of court.

SPECIFICATION "VI" [C. Tr. 679].

During the trial, and while petitioner was in the process of adducing evidence in his own behalf, the trial judge decided to work on the settling of instructions [R. 1580]. The judge permitted petitioner to be excused from attendance, to prepare certain evidence for trial, leaving petitioner's associate to take care of the matter. "The Court: All right. Court will stand adjourned until Thursday morning at 9:30. Counsel will meet with the court in chambers to work on the instructions." [R. 1582]. The record does not reflect what happened thereafter, but the trial judge recites in the certificate that he invited certain officers of the Marine Corps to attend the session in chambers as observers [C. Tr. 679]. The petitioner thereafter assigned this action of the trial judge as misconduct [R. 1810]. The trial judge two months after the trial holds such assignment to be a contempt of court.

It is respectfully submitted that such legal objection is clearly not a contempt of court. It is not a contempt of the court's authority, if litigation is to be fair and advocacy unfettered, to advise a court that its action does not give the appearance of impartiality, so necessary as impartiality itself. As petitioner pointed out, the trial judge had invited into his chambers, during the trial and before the close of the defense, "these officer witnesses from the Marine Corps, who are really adverse to the defendant" [R. 1810]. If the court considered the proceeding in chambers to be no different from the proceedings in the courtroom, then perhaps it might be urged that other interested segments of the public might have been invited by the court on its own motion within reason to avoid any aspect of partiality before the trial was concluded. Clearly, it was not a contempt of court to bring this matter to the court's attention by the assignment of misconduct, even if the court felt that the assignment was without merit.

Specifications "VII", "VIII", "IX" and "X" [C. Tr. 679-81].

We bring these specifications together because the matters are all interrelated, all arise from the same subject matter and occur on the same day. The gist of the charges contained in these specifications is this: It is alleged that the judge instructed petitioner that the truth or falsity of petitioner's charges made originally against the military officers was not in issue and should not be argued, but petitioner argued the issue before the jury though "repeatedly ordered and warned by the court" [C. Tr. 681] not to do so; that petitioner alleged that the judge had intervened to protect the prosecutor but not petitioner; that petitioner accused the judge of bias and prejudice

against petitioner and in favor of the prosecutor; and that petitioner made an inappropriate statement when requesting a recess.

These allegations of "contempt" are so totally at variance with the record as to indicate the danger which flows from post-trial summary contempt proceedings based on a past recollection beclouded with the personal disappointment of the court at the result of the trial.

Prior to the day in question—this was the day of closing summations to the jury—the trial judge indicated to counsel *for both sides* that he did not believe that the question of the truth or falsity of the charges made by petitioner on behalf of his client to the Commandant at Washington, D. C., was an issue in the case. The question generally appeared to the court to be, in the light of the evidence and petitioner's claims of privilege, whether there had been an intentional refusal to answer the inquiries of the court of inquiry, and whether petitioner had actually been excused from attendance under the facts of the case.

With this background, the prosecutor was the first to open to the jury. Despite the admonition of the court, *the prosecutor* informed the jury that petitioner had "made some rather broad and poorly defined charges" against the military officers [R. 2261]. *The prosecutor* stated that petitioner had raised before the court of inquiry "a number of what were actually false and phony privileges. And he did this for the sole purpose of frustrating the court of inquiry in its attempts to secure the facts" [R. 2265].

> "I don't think after you read this that you will feel that this action by Shibley is an honest and sincere attempt by him to substantiate his charges of

> misconduct. . . . But that isn't true of Shibley. He is not that type. *He is the type to make accusations, whether they be true or not, and he is not prepared to back them up*" [R. 2266]. (Emphasis supplied.)

Petitioner objected to the statement [R. 2266]. The judge told the jury only that petitioner's character as a good or bad man or whether he was a good or bad lawyer was not in issue [R. 2267]. The prosecutor was told to proceed [R. 2267]. Here is how the prosecutor proceeded.

> "It is our belief, and I believe you will conclude, that Mr. Shibley's tactics were clearly to obstruct the court of inquiry and to prevent it from getting the facts. *Frankly, they are facts which would prove that Shibley was a liar.* I hate to use that statement in regard to somebody that is a member of the bar, but you can draw your own conclusions" [R. 2274]. (Emphasis supplied.)

Here was continued and flagrant disregard of the court's directions by the prosecutor. There was no reprimand. The only remark after these statements was this: "The Court: Now, the truth or falsity of the matters about which questions were asked is not an issue in this case" [R. 2274]. "Mr. Deutz: I understand that" [R. 2274]. "The Court: Go ahead" [R. 2274].

Petitioner's associate counsel arose to remind the court that serious misconduct had been committed by the prosecutor [R. 2274]. The court told the jury to disregard the remark [R. 2275]. But the prosecutor persisted. The prosecutor maintained that petitioner had taken the stand and his credibility was involved [R. 2275]. Thus, the prosecution was not withdrawing its description of "liar," and all of this was before the jury. *The court now in-*

formed the jury that the prosecutor's statement was correct. "His credibility as a witness before the court is in issue" [R. 2275]. Petitioner's associate counsel assigned the remarks of the prosecutor as misconduct. Counsel pointed out that by turning the question into one of credibility, the prosecutor was palpably discussing the truth or falsity of the charges made by petitioner against the military officers, which the court itself had stated ought not to be argued [R. 2276]. Stated the court: "Your objections now made and previously made are overruled, Mr. Marshall. . . . *Mr. Deutz was within his rights to point that out*" [R. 2276]. (Emphasis supplied.)*

Petitioner opened to the jury in his own behalf. He proceeded with only slight interruptions for a considerable period of time [R. 2285-2303], until a point was reached when petitioner called the jury's attention to the prosecutor's remark "that Mr. Shibley is the kind of a person who makes charges but is unwilling to back them up" [R. 2303]. Here the trial judge intervened. It was now the court's position that petitioner could make no reference to this issue [R. 2303-4]. The court stated that it had ruled out this issue [R. 2305]. Petitioner pointed out that the prosecutor had made those statements, that they had not been stricken, a proper admonition had not been made, that the matter had been gratuitously brought into the case by the prosecutor, and that since the court did not intervene to protect petitioner in that respect, petitioner should at least have the right to reply on the record

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*The relations between the judge and prosecutor are exemplified by the following remarks of the court to the prosecutor during the trial: ". . . I have a high regard for you, I hired you to work for me . . . this is your first criminal case, and you will discover the trials of criminal cases aren't like the trials of civil actions, if you haven't discovered it already." [R. 1428.]

[R 2305]. Petitioner stated that he didn't want to argue anything improper before the jury, but felt himself unable to determine where the line should be drawn [R. 2306].

The court took a short recess and had part of the summation of the prosecutor reread together with the court's remarks [R. 2307-15]. The petitioner pointed out that all the court had done was to declare that the issue of the truth or falsity of the original charge was not before the jury, but the court had not ruled out the issue of credibility, whether petitioner was a "liar" and "the kind of a person who makes charges but is unwilling to back them up" as stated by the prosecutor, that all of the remarks of the prosecutor had not been striken and were implanted in the minds of the jury [R. 2316]. Objection was made to the court's constant intervention to protect the prosecution [R. 2316], with interference with the defense and the failure to protect petitioner in the things that were said by the prosecution [R. 2320]. The motions and objections were overruled [R. 2321]. The prosecutor stated that by his remarks he had not intended "to transgress on the question of the truth of what was said in the court of inquiry" [R. 2321]. "The Court: The less you say the better, probably, Mr. Deutz" [R. 2321].*

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*Directly after the aforesaid discussion, the jury was recalled to hear further summation [R. 2321]. Petitioner requested a five minute recess. The court thought that petitioner had just had a recess, but the petitioner explained the reason he had momentarily left the courtroom on the prior occasion, with the court's permission [R. 2307]. The trial judge, on subsequent recollection, apparently deemed petitioner's explanation in poor taste and specified it as a "contempt" [C. Tr. 680]. No such ruling was made during the trial, and indeed the court treated the incident lightly. Immediately after petitioner's explanation, the court stated: "We will take a short recess. How long do you want, Mr. Shibley?" Petitioner stated: "Five minutes, you Honor." "The Court: All right. I will give you seven." [R. 23228.]

There was no adjudication during the trial that petitioner had been in contempt of court, and indeed, on the aforesaid record, there could be none. The trial judge appears to have recalled after trial with some asperity that petitioner had assigned as error the actions of the judge which appeared to favor the prosecution in the cause and which prejudice the rights of petitioner, but grounds existed for these assignments and they were clearly not "contempts of court." Indeed, at the trial, the judge appears to have believed that petitioner's assignments were not without merit for after the aforesaid recess, the jury was recalled and for the first time, the remarks of the prosecutor were specifically itemized and the jury told to disregard them [R. 2322-24]. Petitioner then proceeded with his argument to the jury without any further interruption [R. 2324-42].*

With all due deference, it is submitted that it would be a palpable injustice on this record to stigmatize petitioner with "contempt." The courts below, it is submitted, have overlooked the evidence and placed the onus of a contempt

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*The Court of Appeals appears to have relied solely on the judge's certificate of contempt and the prosecution's arguments on appeal. As a result, it broadly states that petitioner, contrary to the judge's orders, raised the merits of the "court-martial charges" against his client as well as the merits of petitioner's charges against the military officers (App. A, p. 2). It is asserted that this occurred throughout the trial. No particular instance is cited, and even the trial judge made no such broad charge. There is no basis in the record to support these statements. If counsel on either side strayed into these issues during the trial, the judge simply reminded them that they were going afield. For example, after the petitioner completed his opening statements to the jury at the beginning of the trial, the judge stated: "As I told you, I don't want to limit you as far as your talking about the case to be tried. My interjections were only concerning matters that were not relevant to these issues" [R. 173]. But there never was the slightest indication that a "contempt" had been committed, and the general statements of the court below finds no factual support.

conviction upon petitioner in a manner totally inconsistent with law and the demands of fairness and justice.

SPECIFICATION "XI" [C. Tr. 681].

Here petitioner is held in contempt of court because, in chambers and out of the presence of the jury [R. 2465], petitioner assigned as error the manner in which emphasis was placed upon certain portions of the instructions [R. 2476]. It is not alleged that petitioner was not respectful in making his different objections, nor is there indication in the record that at the time the trial judge did not treat petitioner's objections as seriously made.

It is fundamental that a reading which singles out or gives undue prominence to a portion of the instructions of a court may seriously affect the rights of an accused. The single word or look of a trial judge may lead a jury to a decision of a doubtful case. It is not understandable why it was contempt of court for petitioner to raise the issue.*

SPECIFICATIONS "XII" and "XIII" [C. Tr. 682-3].

These two specifications appear to involve the same matter and we consider them together. It is alleged that petitioner made objections, and after the court had ruled, made further objections; that after petitioner had "three or four bites of the apple," the court halted petitioner

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*"How many of us have witnessed a situation where the judge's views were conveyed to the jury largely by means not appearing in short hand notes—by sharp fleers, by subtle inflections of the voice, by significant pauses or expressive glances? Yet the judge resorting to these tactics is often unconscious of the fact that he is usurping the functions of the jury more insidiously than if he came out directly and told the jury what he thought about the case."

Shientag, B. L., *The Personality of the Judge* (N. Y. 1944), p. 60.

because, as the court states, petitioner before the court of inquiry had repeated statements of privileges and then when halted by the court of inquiry stated, "May I state further privileges." A contempt is alleged because petitioner assigned as misconduct "the angry tone of voice" and "malevolent" look directed at petitioner [C. Tr. 683] during the court's attack upon petitioner's alleged misconduct.

The allegation that petitioner had had too many "bites of the apple" is without support in the record. On November 20, 1953, the day mentioned in the certificate, the jury had been deliberating for almost 24 hours [R. 2516]. Petitioner's associate counsel, as soon as the court convened, moved for a mistrial because of certain events which had occurred the night before and upon the further ground that the proceedings were resulting in a coercion of the verdict [R. 2515-28]. The court opened on November 20, at 11:45 a. m. [R. 2515] and these matters were discussed for about one-half hour [R. 2528] when an adjournment was taken. Petitioner had not uttered a word in these proceedings.

The court reconvened at 3:03 p. m. in the absence of the jury. A communication from the jury was read inquiring whether they were required to consider certain counts in the information if they reached agreement on other counts [R. 2529]. The judge asked for suggestions [R. 2529]. Petitioner's associate counsel moved for a mistrial upon grounds previously stated, which was denied [R. 2534]. The jury was recalled [R. 2533]. The court gave them various instructions, the gist of which was apparently intended to persuade the jury to reach a verdict on every count [R. 2534]. Petitioner had not yet made a single statement.

The court requested counsel to approach the bench and asked if there were any exceptions to its instructions [R. 2535]. The prosecutor had none [R. 2535]. For the first time in the day, the petitioner spoke only to request that petitioner's exceptions be stated in chambers, out of the view of the jury, because a "very critical period" had been reached and counsel was reluctant to have the jury see only the accused taking exceptions [R. 2536]. The request was granted [R. 2536].

In chambers, petitioner made one objection to the court's supplemental instructions upon the ground that in effect the instructions compelled a compromise verdict and did not sufficiently stress that the verdict of each juror must be based on his own independent judgment [R. 2537-38]. The court asked petitioner if there were any further grounds and petitioner stated that the court had in effect replaced its original instructions by the supplemental instructions and failed to apprise the jury of the law in the case [R. 2539]. The two objections were overruled [R. 2539]. The court asked petitioner's associate if he had any objections [R. 2539]. There was one objection advanced by petitioner's associate and some legal discussion [R. 2539-42], and the objection overruled [R. 2542]. Petitioner requested the court to give one of the proposed instructions (No. 39), and failing that, to instruct the jury that in the light of the presumption of innocence and the prosecution's burden of proof, a compromise verdict would not satisfy the requirements of the law [R. 2543-4]. These requests were denied, immediately followed with the outburst by the court against petitioner concerning "three or four bites of the apple" and petitioner's conduct "before the court of inquiry," followed petitioner's assignment of judicial misconduct [R. 2544].

These were proceedings in chambers. The entire proceedings could not have consumed more than ten minutes. The period in the trial was crucial and clearly, as the court recognized, some objections to its supplemental instructions, given to the jury who had been deliberating for more than twenty-four hours, were appropriate. Petitioner's objections were extremely few in number and appeared relevant. They were made respectfully. No reason appears in the record why the trial judge suddenly castigated petitioner, and it is not denied that the broad statements made by the judge and directed at petitioner were made heatedly, and it is not claimed that petitioner's assignment of judicial misconduct was made in any manner other than with due respect. It is submitted that this brief interchange in chambers at the end of the trial, initiated by the trial judge, did not justify the invocation of "contempt."

SPECIFICATION "XIV" [C. Tr. 682].

This alleged "criminal contempt" did not involve the court in any way. When the jury, after deliberating for 24 hours, returned to receive the supplemental instructions from the trial judge as aforesaid, the Chief United States Attorney and an assistant for the first time appeared in the trial and seated themselves at the counsel table in the immediate view of the jury [R. 2547]. After the jury retired, petitioner objected and noted that this had the appearance of putting pressure upon the jury to return a verdict against petitioner [R. 2547]. Petitioner's associate counsel also stated that this sudden appearance of the United States Attorney at the counsel table would have "a prejudicial effect to work coercion upon this jury to the damage of the defendant" [R. 2550]. The objections were overruled. The court, of course, never

indicated that such objections were a "contempt." They were certainly entitled to be made, it is submitted, since it does not impinge upon the prerogative of a prosecutor to urge that such sudden appearances by a public figure at a crucial period in the trial should be avoided in the interests of the appearance of justice.

SPECIFICATION "XV" [C. Tr. 683-4].

This specification merely rejects the affidavit of bias and prejudice submitted by petitioner.

SPECIFICATION "XVI" [C. Tr. 685].

This specification concludes that on the basis of specifications "I to XIV," petitioner, "an attorney at law," is in "summary contempt of this court."

It is submitted that on the actual record, the certificate and judgment of contempt are without support. The rights of litigants and their counsel under the fundamental law can hardly be maintained, it is respectfully submitted, if this drastic and unfettered extension of the contempt power by the courts below is permitted to remain as a precedent unreviewed by the Supreme Court of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 322

GEORGE E. SHIBLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A, pp. 1–5; R. C. 709–712 [1]) has not yet been reported. The certificate of contempt entered by the district judge (R. C. 670–685) is annexed as an Appendix, *infra*, pp. 1a–16a.

[1] The designation "R. C." refers to the record of orders and documents certified by the clerk of the Court of Appeals.

The designation "R." refers to the reporter's transcript of testimony, in 21 volumes. The first volume of the transcript will be referred to as "Vol. A" since its pagination commencing with page 1 is repeated in the next volume. The remaining volumes proceed in consecutive pagination and are therefore referred to only by page and not by volume.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. B, p. 6; R. C. 713) was entered on June 18, 1956. On July 9, 1956, Mr. Justice Burton extended the time for filing a petition for a writ of certiorari to and including August 17, 1956, and the petition was filed on August 15, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial judge's holding of petitioner in contempt is sustained by the record.

2. Whether the trial judge was required to submit the issue of contempt to another judge.

3. Whether the trial judge lost jurisdiction of the summary contempt proceeding by reason of continuances for five weeks to permit transcription of portions of the extensive record, and for an additional three weeks because of petitioner's illness.

STATUTE AND RULE INVOLVED

18 U. S .C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> * * * * *
>
> (3) Disobedience or resistance of its lawful * * * order, rule, decree, or command.

Rule 42 (a), F. R. Crim. P., provides:

> A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Ninth Circuit (Pet. App. B., p. 6) affirming the judgment of the District Court for the Southern District of California holding petitioner in contempt for conduct before the District Court. Petitioner had been sentenced to imprisonment for thirty days. The Court of Appeals—because petitioner had also been convicted in another case involving criminal charges of receiving and converting a transcript of proceedings of a United States Marine Corps Court of Inquiry and of conspiracy to commit burglary in a United States building (*Shibley* v. *United States,* pending on petition in this Court, this term, No. 243), and also because several counts of the information (in the case in which the instant contempt occurred) had not yet been determined by the jury—remanded the cause to permit the trial judge to reconsider the sentence for contempt in view of these conditions (R. C. 712).

The certificate of contempt is annexed as an Appendix, *infra,* pp. 1a–16a. As noted there, the contempt proceedings followed the trial of an information

charging petitioner with refusal to answer questions before a Marine Corps Court of Inquiry which had been called to investigate charges of personal misconduct made by petitioner in a letter to the Commandant of the Corps written after petitioner had, as civilian counsel, represented one Sergeant Bennette at a trial by court-martial (see App., *infra,* p. 2a). The validity of the Court of Inquiry and its power to require testimony had been upheld prior to trial in a comprehensive opinion by Judge Yankwich. 112 F. Supp. 734. Petitioner, who had co-counsel, elected to represent himself when told that only one could participate, and, even after the court (early in the trial) changed the ruling, petitioner took a major part in the trial (App., *infra,* pp. 2a–3a). The jury was unable to arrive at a verdict on three of the six counts (Counts 4, 6, and 7) and acquitted as to the charges in the remaining three counts (R. 2558–2559).[2]

At the conclusion of the trial, on Friday afternoon, November 20, 1953, when the jury brought in its verdict, the trial judge (Judge James M. Carter) addressed the jury in review of the case. He first pointed out his own conduct in theretofore refraining from any indication of his thoughts, but stated that, now that the case was over, he considered the verdict "a miscarriage of justice" (R. 2559). He said that the case was a simple one, involving specific factual

[2] With respect to three of the original nine counts of the information (Counts 3, 8, and 9), the government elected not to offer evidence, and acquittal was granted by the court. The remaining six counts charged refusals to answer specific questions before the Court of Inquiry (App. 2a).

issues, which he thereupon reviewed (R. 2559–2560). He continued (R. 2560–2561):

> Some of you people have had no previous jury experience, and I know the case took longer than it probably should have, there were interruptions from time to time, but I should also tell you this, which of course you don't know: On a verdict of acquittal the Government has no appeal, and that is the end of the case on the counts on which there has been an acquittal. If the defendant is convicted, of course the defendant has an appeal. So that is the end of the counts on which you have returned a verdict. And I tell you that the issue, after all the smoke was blown away, was a relatively simple issue, and if jurors in cases like this bring in this kind of verdict, the Government might well save its money in trying cases involving the United States before juries.
>
> The fact that I disagree with you, however, does not indicate that I have any hard feelings against you. People's minds differ. There may be things that I know that you do not know. I suppose there might be a dozen or fifty explanations. We will not worry about that particular matter.
>
> The court wants to thank you for your patience and your service in the case, and in a moment we will excuse you. In fact, I now excuse you, but I suggest you remain in your seats for just a moment. [R. 2560–2561.]

The judge then referred to the fact that petitioner had accused Marine Corps officers of perjury, had accused the government attorney of dishonesty, and

had accused the judge of slanting the reading of instructions. The judge also referred to petitioner's repetitiousness and to his general conduct "in a way ill fitting a lawyer in this court," and directed petitioner to return on Monday morning when the matter of summary contempt would be taken up (R. 2561–2562).

The judge thereafter continued the matter of contempt until December 7 and then to December 28, 1953, in order to await the transcription of certain portions of the record by the reporter, the total transcript consisting of over 2,800 pages (R. 2566, 2575, 2580).

On December 28, petitioner requested a continuance on account of illness, and the matter went over to January 18, 1954 (R. 2584–2585), on which date the judge filed his certificate of contempt, and sentenced petitioner to 30 days' imprisonment (R. 2587–2592).

The certificate of contempt consists of 16 sections. As background, the second section sets forth in detail that, despite the prior ruling of Judge Yankwich, and despite the admonitions of the trial judge, petitioner and his co-counsel continued to make lengthy oral motions on points which had previously been ruled upon, thereby unduly extending the trial.[3] The specifications

[3] Petitioner's statement (Pet. App. 10) that the first eight days of the trial were consumed by the prosecution's case fails to mention the fact that most of the time was taken up by his motions and cross-examination, the nature of which is illustrated by the subsequent discussion in the text. The government called three witnesses to identify the record (R. 379, 625) and to prove the service of a subpoena upon petitioner (R. 789).

of contempt are set forth in paragraphs 4–14 of the certificate. Due to the length of the record, we do not undertake to discuss all of the specifications in detail, deeming it sufficient merely to document the pages of the record to which some of the specifications refer.

1. The fourth section of the certificate relates to petitioner's constant practice of making oral motions on points which had previously been ruled upon, the court noting that the nature and extent of such conduct could be appreciated only in relation to the entire record (App. *infra*, p. 9a). Within the limits of a brief in opposition to a petition for certiorari, we can do no more than suggest the type of conduct to which the judge was referring:—

a. The first witness called by the government was for the purpose of identifying the transcript of the record of the Court of Inquiry (see R. 379–381). The witness explained the manner in which the transcription was made from voice recordings (R. 389). In the course of a lengthy cross-examination, petitioner called attention to the fact that the transcript bore a notation of the hours at which the court opened and closed and asked whether the voice of the president of the Court of Inquiry was recorded making such statement (R. 477, 479). The District Court pointed out that the matter was immaterial (R. 478), stating that, while it was permitting petitioner to go into questions concerning the correctness of the record, the fact that some recorder wrote down the time was immaterial (R. 479). Thereafter, after further lengthy cross-examination

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of the witness, under the court's ruling that petitioner could inquire into bias (see R. 557–558), petitioner, out of the presence of the jury, asked for the production of the phonographic belts (R. 560). Petitioner said that he intended to show discrepancies from the belts (R. 562), and the court ruled that it would hear counsel as to what the correct record should be as to the questions asked of petitioner, his objections, etc., but that it was not going to go into matters concerning other witnesses at the Court of Inquiry (R. 564). When asked to be specific, petitioner again pointed to the failure of the recordings to contain the notation as to the court closing (R. 569) and the court ruled that this was immaterial (R. 569).

Thereafter, the sergeant who had taken the recordings testified (R. 625 *ff*), *inter alia*, that he turned the machine off when the court recessed, even if, as happened on some occasions, the president did not make an oral announcement (R. 630). During a recess in this witness' testimony, counsel for the government called to the attention of the trial court the fact that petitioner had served a subpoena duces tecum for the belts relating to the Bennette pretrial investigation and court-martial, as well as all belts, machinery and apparatus used at the Court of Inquiry (R. 637–638, 640). The court ascertained that the machine was both heavy and sensitive (R. 646) and quashed the subpoena as to the machinery until there was some showing that it was necessary (R. 649). It directed production of the belts as to the Court of Inquiry and quashed the subpoena

as directed to the Bennette trial on the basis of its earlier ruling (R. 649–650).

The next day, the sergeant who had previously been on the stand testtified that at each recess and opening of the Court of Inquiry he recorded the time on a pad and, when he transcribed the record, added the time (R. 674). Petitioner opened his cross-examination of tthe witness by asking if all the officers in the room were not his superiors (R. 677–679), and whether he recalled as the recorder that one of the chargess against Bennette was willful disobedience of the orrder of a superior officer (R. 681). He then asked that the officers be excused while the sergeant was ttestifying (R. 682).

After cross-examinattion of the witness as to just where he was sitting, how the machine operated, etc. (R. 686–726), petitioner handed the sergeant a paper which the witness admmitted was in his handwriting, reading "4th day Open—1000" "not on roll check" (R. 727–729). The witness explained that this meant that the president hadd opened the court before the switch had been turned on, but that he could not be sure whether it was at the Bennette trial or the Court of Inquiry (R. 730). At this point court adjourned, and after the jury had been excused, the court stated to petitioner that, since he had expressed himself as unfamiliar with federaal procedure, the court thought it was its duty to warrn petitioner that he was building up a tremendous record on matters which were at best barely relevannt (R. 731–732). When court reconvened, and petitioner was asked what he ex-

pected to prove by the paper, he said that it would show that the opening was not recorded on the record (R. 752–753). The court again reminded counsel that it had ruled that this issue was immaterial (R. 753–756). Later, in cross-examination of a government witness, petitioner went into the matter again (R. 1736–1738).[4]

b. Early in the course of the trial, the judge admonished petitioner that the Bennette case was not to be retried in the instant proceeding. The judge stated, "You may allude briefly to that case for the purpose of background, but we are not going to try the Bennette case in this court" (R. 150). Similarly, the judge admonished petitioner against attempts to inject into the instant trial the personal charges made in the letter to the Commandant of the Marine Corps at a time prior to the convocation of the Court of Inquiry.[5] Nevertheless, the judge had frequent occasion to repeat these admonitions (R. 152, 154, 156–160,

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[4] Petitioner, in defense, was allowed to testify that from his recollection, as refreshed by the tapes, there were inaccuracies in the transcript. He was allowed to testify to alleged statements after adjournment or recess (R. 1225–1325; see R. 1200–1201, 1223–1224).

[5] "We are not going to try your charges made in your letter, either, Mr. Shibley. The issues before this jury will be: was there a Court of Inquiry called that had jurisdiction? Were you subpoenaed to appear before that court? Were you asked certain questions, which you refused to answer, and were you ordered or directed to answer the questions, and did you do so unlawfully? Therefore, we are not concerned with whether the statements you made were true or false, generally speaking, nor are we concerned with whether you can prove them, because we are not trying General Megee or Colonel Endeweiss in this case" (R. 152).

163, 557–558, 615, 650, 826, 1822). As noted above, petitioner endeavored, in the midst of trial, to subpoena the record of the Bennette court-martial (R. 650).

2. The fifth section of the contempt certificate (App., *infra*, pp. 9a–10a) states that on Octoer 29, 1953, toward the end of the trial day, petitioner deliberately delayed the proceedings, by stating and withdrawing questions, looking at the clock, and indulging in long and irrelevant argument, and then engaged in an emotional scene before the jury which virtually compelled the judge to adjourn the proceedings for the day. The incident to which the judge refers appears at pages 793–808 of the record:

The third witness for the government was the colonel who had served a subpoena upon petitioner (R. 789). After he had testified to service of the subpoena, the government attorney also asked him to identify his signature on Exhibit 1–A, the transcript of the testimony at the Court of Inquiry (R. 792), the accuracy of which had been the subject of days of cross-examination as described above. Petitioner asked that admission of the subpoena and return be deferred until the next morning when his co-counsel, who had been excused, would be present, and the court directed the United States Attorney to offer the exhibit in the morning (R. 793).

Petitioner stated, however, that he wished to examine the witness at that time (R. 793). On cross-examination, petitioner asked the witness whether his signature on that transcript was a certification that

it was true and correct (R. 794). At that point the court said that it was not going to open up for cross-examination that entire line and would entertain a motion to strike the questions relating to the signature on the transcript (R. 794–795). The court made it clear, however, that its ruling went merely to the transcript, and that the rest of the testimony of the witness remained (R. 795). After that ruling, petitioner continued his cross-examination, asking such questions as in what building the subpoena had been prepared (R. 799), and the name of the staff legal officer at that time (R. 802). The court said it would continue until cross-examination was completed, stating that petitioner could have as much time as he wanted (R. 802). Petitioner then referred to his physical condition, his lack of sleep, and the absence of his attorney (R. 802). The court pointed out that the direct examination was very short and that in the morning, if counsel wanted to take up other matters, the witness would be available. He directed the jury to draw no inference from his remarks in directing petitioner to proceed, noted that there had already been some cross-examination and his belief that the matter could be concluded by five o'clock. Petitioner then said (R. 804):

> Your Honor, I am not prepared to proceed. And if I must forego my cross-examination, I don't consent to it, but I must your Honor.

In its certificate of contempt, the court describes petitioner's demeanor in these colloquies as "an emotional scene" (App., *infra*, p. 10a).

After the jury had been excused, the judge pointed out that he had "tried to extend" to petitioner the "limits of cross-examination," that he believed everyone was entitled to his day in court, but that in his opinion petitioner was not doing himself any good (R. 805). He noted that while petitioner was cross-examining he was observing the clock and apparently stalling; that co-counsel had been excused with petitioner's consent; and that, with co-counsel present, petitioner had undertaken to conduct most of the defense himself (R. 806–807).

3. The sixth section of the certificate (App. *infra,* pp. 10a–11a) deals with petitioner's conduct arising from the judge's suggestion, out of the presence of the jury, that certain Marine Corps officers observed in the courtroom and known to the judge to be lawyers might wish to attend an open session in chambers where the instructions for the jury were to be discussed. This incident, in full (R. 1809–1812), is as follows:

> Mr. SHIBLEY. Now, your Honor, I would appreciate your Honor letting me state my case.
>
> I must assign, your Honor, as misconduct your Honor's constant aid of the prosecution. Something came to my attention that I do wish to make a record of.
>
> The COURT. Mr. Shibley, proceed.
>
> Mr. SHIBLEY. At this time, it having come to my attention last night, having been told by my client, I do wish to assign as misconduct and evidence of prejudice in this case what I am informed took place the other day in the discussion of instructions.

I am informed that your Honor came out here, called Mr. Marshall and Mr. Deutz, and invited these witnesses, these officer witnesses from the Marine Corps, who are really adverse to the defendant, in, saying, "Well, you are lawyers, come in."

The COURT. It is an open session of court held in chambers.

Mr. SHIBLEY. I wish to conclude my assignment, your Honor. That your Honor—that my client Master Sergeant Bennette was standing around, and that he certainly has a definite interest in my fate, since if I lose he may expect to be racked, to use Marine Corps language, and that your Honor made no extension of any courtesy or invitation to him, or to my secretary, who has been keeping notes for us. And I do wish to assign that, your Honor, along with your Honor's general attitude of ingratiation toward the prosecution, of undue deference and assistance to the officers, and the brass from the Marine Corps, to your Honor's unequal treatment of the defense witness, and unequal treatment——

The COURT. Mr. Shibley, I consider you being contemptuous of this court. Proceed with any offer of proof that you want to make.

When a jury is here, and you are representing yourself as a lawyer, as it were, for yourself, then this court is under a handicap, because you don't have to comply with the rules that a lawyer would have to comply with, because you are the defendant. But there is no jury here present now.

Now, I take it these matters that you have been going on at length about, some of them

may be matters which you can have a right to make a record on, and some not. Now, you will confine—you are a lawyer—out of the presence of the jury, you will confine yourself to those remarks that are lawyerlike objections, and refrain from matters that aren't lawyerlike.

Mr. SHIBLEY. May I ask if it is your Honor's direction that I am not permitted to assign these things?

The COURT. You may assign such matters that you contend are misconduct that you think are proper, and which are made in a lawyerlike manner.

Proceed.

Mr. SHIBLEY. May I just say, your Honor, that I contend that these matters are matters to which I may make an assignment.

The COURT. All right. No. 1. Certainly, the settlement of instructions in a case, which are held in an open hearing, although it is held in chambers, it is not some thing that you can complain about. And there was no record made. Mr. Marshall was present. There was no request that your secretary be admitted. She would have been admitted if she had asked. The fact that we held them in chambers was no different than holding them here in the court room, except we were all a little more at ease. And there was no record then made by Mr. Marshall, nor was request made for the presence of any other persons. And it therefore cannot now be made by you as an assignment of error. So I won't hear you any further on that.

4. The seventh and eight sections (App., *infra*, p. 11a) deal with occasions on which petitioner accused the judge of "serious judicial misconduct and indicating a serious bias and prejudice against [petitioner], and a serious bias and prejudice in helping Mr. Deutz [the government attorney]" (R. 2320, see also R. 2316). Petitioner also asserted (R. 2320):

> * * * I also wish to assign as misconduct something * * * that you apparently said on the record when I wasn't listening: that Mr. Deutz was appointed by you to the U. S. Attorney's office when you were the United States Attorney. And I assign your Honor's constant interference with the defense, in aid of the prosecution, and constant failure to protect the defendant in this case from the sort of things that were said here, as being serious misconduct * * *.

The remark referred to was made by the judge in overruling the government's attempt to keep from the jury the fact that petitioner had been brought back before the Court of Inquiry by armed guard (R. 1423–1427). The court said to the government trial attorney (R. 1428):

> * * * I have a high regard for you, I hired you to work for me—this is your first criminal case, and you will discover the trials of criminal cases aren't like the trials of civil actions, if you haven't discovered it already. I don't see how you can escape having at least a stipulation, or, if not a stipulation, minimum testimony, that there was an arrest and transportation to the Marine base.

5. The ninth section (App., *infra,* pp. 11a–12a) holds improper petitioner's language upon the occasion of the judge's objection to a second request of petitioner for a recess within 20 minutes of an earlier one. It appears at R. 2322.

6. The tenth section (App., *infra,* pp. 12a–13a) concerns petitioner's repeated arguments before the jury as to the truth or falsity of his own general charges against the Marine Corps, despite the judge's admonitions to remain within the issues of the instant trial (R. 2290, 2300, 2303–2306).

Petitioner endeavored to justify his remarks by pointing out that the government attorney had called him a liar (R. 2303). The court noted that it had instructed the jury to disregard the remarks and that the truth of the charges was not in issue (R. 2303). At petitioner's request, the portion of the record involved was re-read out of the presence of the jury (R. 2305–2307). That showed that the court had objected, even before petitioner had, to the government attorney's remark and asked the jury to disregard it (R. 2274–2275, 2308–2309); that, when the government attorney had said that petitioner had put his credibility in issue, the court had replied that that was true but "that still does not mean that you may go into the question of the truth or lack of truth on these matters concerning charges at the base" (R. 2275, 2310). The court had then specifically instructed the jury that the court-martial of Bennette and petitioner's charges were not in issue (R. 2277, 2311).

7. The twelfth section (App., *infra,* pp. 13a–14a) deals with petitioner's repetitiousness in making objections and taking exceptions after the judge had ruled (R. 2537–2539, 2542–2545).

8. The thirteenth section (App., *infra,* p. 14a) holds contemptuous, as pointed out by the judge at the time of occurrence, an accusation by petitioner that the judge was speaking angrily and looking at petitioner "in what appears to be a malevolent and angry way" (R. 2544–2545).

9. The fourteenth section (App. *infra,* pp. 14a–15a) finds an assignment of error by petitioner to be frivolous to the degree of contempt; *i. e.,* petitioner's accusation that an attempt to "further impress or put pressure upon this jury to find some sort of verdict against this defendant" was involved in the taking of seats at the counsel table by the United States Attorney and an assistant when the jury returned for further instructions (R. 2547–2549).

Upon appeal, the Court of Appeals affirmed the conviction of contempt, stating (Pet. App. A, p. 2–3):

> The record bears out the statements of the certificate in essential particulars. The evidence was amply sufficient to sustain the charges.
>
> * * * [Petitioner] consistently spoke and acted with complete contempt of the court. He attempted to and fairly succeeded in taking complete control of the trial, because of the attempt of the trial judge to act as an impartial arbiter and because the trial judge refrained

from criticizing the conduct of [petitioner] before the jury as far as possible. Specifically, [petitioner] continuously and contrary to the rulings and directions of the judge, insisted on bringing before the trial jury, in opening statement and other places during presentation of evidence and in final arguments, the merits of the case * * * before a Marine Corps court-martial, charges which [petitioner] had made against Marine Corps officers on which the Court of Inquiry had been convened, and constantly ignored directions and rulings of the court.

* * * * *

Many of the recitals of the certificate might not state specific acts which were of themselves contemptuous, but they give color and emphasize the necessity of the judgment as to the particulars of conduct recited.

* * * * *

* * * If there is a conviction, then a subsequent penalty for contempt appears to the unthinking as a cumulative and vindictive punishment. But where there is a verdict of "not guilty", as in this case, the charge can always be made, as it has by the lawyer defendant here, that the trial judge was disappointed at the verdict and therefore assessed a punishment for contempt. But the record here, cold as it is, is replete with evidence of such utterly contemptuous conduct that a trial judge would have been recreant to his duty if he had failed to notice the assault upon the dignity of the tribunal, whatever the verdict were. * * *

The Court of Appeals characterized petitioner's conduct as a "cold, consistent, calculated design to influence the jury by extraneous matter," and said (Pet. App. A, p. 4):

> * * * This lawyer defendant is brazenly citing the success of his contempuous behavior as a reason for relieving him of its consequences.

With respect to petitioner's contention that the trial judge was not the proper judge to enter the certificate of contempt after expressing his opinion of the jury's verdict, the Court of Appeals held (Pet. App. A, p. 4):

> * * * The trial judge, throughout the trial, exercised admirable self restraint before the jury. He would have had a perfect right to comment on the evidence during instruction if he did so fairly. The fact that he did not and refrained from an expression to the jury of the conduct of defendant during the trial may have resulted in this result which he thought unjust. He had a right to say he thought so. There can be no doubt the judge had at that time made up his mind about the conduct of defendant before the Court of Inquiry and before him. * * *

ARGUMENT

1. The contention (Pet. 26–29) that petitioner's conduct was not contemptuous is, we think, amply answered even by the necessarily incomplete summary of his conduct set forth in the Statement, *supra,* pp. 6–18, and even without the nuances of voice and manner which the trial judge observed but which the rec-

ord cannot reflect. If there were nothing else in this record—and there is in fact a great deal more—the finding of contempt is justified by the manner in which petitioner registered his objection to the fact that the court invited Marine Corps officer defendants to the open hearing in chambers on the settling of instructions. It was possible, as the temperate language in the present petition for certiorari shows, to have preserved an objection without reaching the offensiveness of accusations of a "general attitude of ingratiation toward the prosecution, of undue deference and assistance to the officers, and the brass of the Marine Corps." See the Statement, *supra*, p. 14. Despite the warning to petitioner that he was not making his objections in a lawyerlike manner and that he was being contemptuous (see the Statement, *supra* p. 14), petitioner and his co-counsel continued to make similar accusations in an equally offensive manner (see the Statement, *supra*, pp. 16, 18; R. 2316–2317, 2320, 2471–2472; and see R. 2520–2526). From the record, the conclusion is warranted that petitioner was deliberately laying a convenient and irresponsible groundwork for a contention, should the verdict be against him, that the judge was biased. He also seems to have been attempting to provoke the judge by calculated affronts and refusals to abide by court rulings. A trial judge would have done no service to the cause of judicial order and dignity if he allowed such deliberate, calculated effrontery to pass unrebuked.[6]

[6] As the judge pointed out in passing sentence, petitioner showed, in arguing against imposition of sentence, that he was capable of

2. The argument that the judge had become too involved to be able to rule on the contempt (Pet. 20–23) is also fully answered by the record which, as the Court of Appeals held, shows that throughout the trial the judge had "exercised admirable restraint before the jury" (Pet. App. A, p. 4). The whole record establishes that, despite petitioner's provocations, the trial judge conducted the proceedings with judicious impartiality, taking great pains to make certain that petitioner had a fair trial and ample opportunity to present any valid defenses he might have.

Petitioner's truncated quotations from the record (Pet. 8–13) present an incomplete picture. In themselves, however, these remarks reveal none of the bias which petitioner attempts to inject into them. The first quotation (Pet. 8, A) was a reasonable explanation of the court's legal ruling on a legal issue. The second (Pet. 8, B,) is in fact a good illustration of

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"a courteous and lawyerlike presentation" (R. 2597). The judge also noted that he had taken into account petitioner's emotional involvement in the case and had advised him to let co-counsel conduct the case (R. 2599). But the judge did say, "I don't recall of a case in which, either in dealing with prosecutors when I defended cases, or in trying cases when I was a lawyer, or while I sat on the bench, that a lawyer has conducted himself as you did in this courtroom" (R. 2598). And he added: "The fact that you and I were acquainted, you say friends, doesn't enter into the matter. I am not proposing to sentence you because I dislike you. I am proposing to sentence you because if lawsuits were permitted to be conducted as you attempted to conduct a lawsuit in this court, you wouldn't have the administration of justice, you wouldn't have adequate trials, you wouldn't have time to take care of the court's business, you wouldn't have fair verdicts, the process of justice would be made a farce" (R. 2598).

* * * * *

the manner in which the judge did deal with petitioner. The judge was hearing testimony *out of the presence of the jury* on the issue of the jurisdiction of the Court of Inquiry, and, when petitioner objected to the use of a certified copy of the transcript, the judge said that he would take the original. The third quotation (Pet. 8–9, C) must be considered in relation to its background. At the opening of trial, on October 20, petitioner had, in his own words, "handed to the court what started to be a section of a brief which was never completed" (R. 193–194). The next day, when argument ensued as to whether the court would consider itself bound by Judge Yankwich's ruling on the motion to dismiss (R. 194–206), petitioner asked for a recess, saying "This comes as, rather, not a shock to me, I wouldn't say, but I wasn't prepared for it this morning, just as I wasn't prepared to argue yesterday morning before you" (R. 206). There was still further argument as to matters alleged not to be covered by the ruling, the judge excused the jury (R. 206–226), and the rest of that day was consumed in argument. Under these circumstances, when the judge, the next day, responded with a touch of irony to petitioner's request for leave to hand in incomplete memoranda (R. 373), it can hardly be said that the judge was displaying bias.

A good example of petitioner's incomplete presentation of the record is incident numbered G (Pet. 10–11). Petitioner fails to state that the judge's question (during argument *out of the presence of the jury* on the admissibility of evidence) as to the person to

whom he was making a speech was preceded by a statement by petitioner that alleged omissions from the record of the Court of Inquiry showed "a court so covered and filled with dirt and corruption * * * a court so saturated with tyranny and corruption and dishonesty, that it could not conduct a fair, decent or impartial hearing" (R. 1821); and that petitioner had referred to a rule "in the United States under the Stars and Stripes and our constitutional form of government" (R. 1822).

Incidents D (Pet. 9), I (Pet. 11–12), J (Pet. 12) and other alleged examples cited at pages 12 to 13 of the petition are all matters discussed in the certificate of contempt. See the Statement, *supra,* pp. 11–12, 18. It does not show bias for the judge to call contemptuous conduct contempt. How little the judge allowed petitioner's personal attacks upon him to affect the conduct of the trial is illustrated by an incident, which petitioner does not choose to cite, appearing at pages 1690 to 1697 of the record. Petitioner during a recess, after he had been on the stand, had accused the judge of a series of grimaces which could only have the effect of making the jury believe there was something unethical about his conduct (R. 1691). The court disclaimed any such intention (R. 1692). When the jury reconvened, the judge not only charged the jury, as he had told them on many previous occasions, that they were to disregard the remarks of the court; he not only said, "I am not a particularly pleasant thing to look at, but I haven't intended to grimace or scowl

or to indicate displeasure with either the defendant or his attorney or with the Government or its attorney"; but he went on at that point to charge on the presumption of innocence and function of the jury to determine the facts (R. 1696–1697). Note should also be taken, on the question of personal involvement, of the good-humored manner in which, toward the very end of the trial, after the defense had argued its case until closing time on November 18, the judge agreed to give the defense an extra ten minutes to present its case on the defense protestation that the next morning only the government's version would be before the jury (R. 2361–2367). And, in this connection, it should be borne in mind that while, on the two occasions cited by petitioner, Incident F (Pet. 10), and Incident I (Pet. 11), the judge, out of the presence of the jury, expressed the view that petitioner had behaved improperly before the Court of Inquiry, he completely refrained from giving any intimations of his opinion in his charge to the jury.

Petitioner's quotation from the judge's statement to the jury after the verdict (Pet. 3), a fuller portion of which is set forth in the Statement, *supra,* p. 5, again gives it a coloration which the full text (R. 2559–2561) belies. While the judge, after the whole case was over, made it clear that he did not agree with the jury's verdict, he also made it clear that he recognized that "people's minds differ" (R. 2561). The judge's statement to petitioner as to his contempt indicates no origin of the contempt charges against

petitioner in a sudden disappointment with the verdict. Petitioner had been repeatedly corrected during the trial; he had twice been told directly that he was in contempt (R. 1810, 2317, 2545); and his co-counsel had also been warned that the judge "considered some of Mr. Shibley's conduct in this court contemptuous of the court" (R. 2526). Apparently, petitioner did not really believe that the judge meant what he said because the latter had so scrupulously recognized that petitioner's position as a defendant made it impossible for him to be treated as if he were an ordinary lawyer, and the judge had so carefully refrained from making an issue of petitioner's misconduct, merely telling him on several occasions—and that outside the presence of the jury—that he was in contempt.

In this case, petitioner's contention that the trial judge was not in a position to decide the matter of contempt thus becomes equivalent to the argument that, if a lawyer interlards his misconduct with sufficient personal insults against the judge, the offender may then assure himself of the delay and opportunities of yet another trial (on the contempt charge) with opportunity to pit his word and explanations and skill against the direct observations and integrity of the trial judge—even though there is, in fact, no adequate reason to believe that the trial judge did actually become so far personally involved that he should have refrained from passing on the contempt. Such an opening for skilled and contemptuous practitioners could go far to make a mockery of court procedure and dignity, and could eliminate the rule providing

for summary contempt orders (Rule 42 (a), F. R. Crim. P., *supra*, p. 3). As this Court held in *Sacher* v. *United States*, 343 U. S. 1, 11–12:

> A construction of the Rule is advocated which would deny a judge power summarily to punish a contempt that is personal to himself except, perhaps, at a moment when it is necessary to forestall abortion of the trial. His only recourse, it is said, is to become an accuser or complaining witness in a proceeding before another judge.
>
> The Rule itself expresses no such limitation, and the contrary inference is almost inescapable. * * * *It cannot be that summary punishment* is only for such minor contempts as leave the judge indifferent and *may be evaded by adding hectoring, abusive and defiant conduct toward the judge as an individual. Such an interpretation would nullify, in practice, the power it purports to grant.* [Emphasis added.]
>
> * * * * *
>
> That contempt power over counsel, summary or otherwise, is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir. Most judges, however, recognize and respect courageous, forthright lawyerly conduct. They rarely mistake overzeal or heated words of a man fired with a desire to win, for the contemptuous conduct which defies rulings and deserves punishment. * * *

Petitioner seeks to equate the instant situation to that of *Offutt* v. *United States*, 348 U. S. 11, but

exactly that conduct of the judge in *Offutt* which was the basis of the decision was scrupulously avoided by the judge in the instant case, nor was a comparable personal animosity involved. In *Offutt,* this Court referred to such incidents as:

> The COURT. Just a moment. If you say another word I will have the Marshal stick a gag in your mouth. [348 U. S. at 16, fn. 2.]
>
> * * * * *
>
> The COURT. You have forfeited your right to be treated with the courtesy that this Court extends to all members of the bar. [348 U. S. at 17, fn. 2.]

Here, as we have noted, all remarks critical of petitioner were made out of the presence of the jury and confined to brief statements; moreover these remarks were not unduly harsh in the circumstances. Beyond that, occasional irony—and that, too, out of the jury's hearing—is all that petitioner points to as showing bias. We submit that the Court of Appeals properly found that the trial judge was justified in himself punishing the contempt committed before him.

3. Petitioner complains of the lapse of time between the judge's notice to him immediately after the trial and the actual entry of the certificate of contempt and the imposition of sentence. Petitioner's complaint misconceives the nature of summary contempt and the difference between such proceedings and other types dealt with in a separate subsection of the Rule. (Compare the applicable provisions of subsection (a), *supra,* p. 3, with the provisions of subsection (b),

Rule 42, F. R. Crim. P.). As held by this Court in *Sacher* v. *United States,* 343 U. S. 1, 9–10:

> * * * "[S]ummary" as used in this Rule [42 (a)] does not refer to the timing of the action with reference to the offense but refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submissions of findings, and all that goes with a conventional court trial. The purpose of that procedure is to inform the court of events not within its own knowledge. The Rule allows summary procedure only as to offenses within the knowledge of the judge because they occurred in his presence.
>
> Reasons for permitting straightway exercise of summary power are not reasons for compelling or encouraging its immediate exercise. Forthwith judgment is not required by the text of the Rule. Still less is such construction appropriate as a safeguard against abuse of the power. * * *

In this case, the trial closed on Friday afternoon, November 20, 1953. The judge immediately stated—specifying some of petitioner's offenses—that the matter of summary contempt would be taken up on Monday morning, November 23. On that date, the judge continued the matter for two weeks and thereafter for an additional three weeks until at least the appropriate portions of the 2800 pages of transcript could be written up by the court reporter. There-

after, it was petitioner who asked for a continuance, due to illness; the matter was finally disposed of on January 18, 1954 (*supra*, p. 6).

Neither the date set by the judge (a postponement of five weeks) nor the later date obtained by petitioner (a total elapsed time of less than two months) affected the essential nature of the summmary aspect of the contempt, *i. e.*, the actual occurrence of the offenses before the judge himself. Petitioner suggests that the judge might have forgotten the facts during the intervening time, but it is noteworthy that in *Sacher* v. *United States, supra,* affronts occurring more than eight months before, in earlier stages of that trial (see 182 F. 2d 416, 432–433), would have been more likely to be vague in the judge's memory of that extensive record than the more recent events of this much shorter trial.

Common experience negates the possibility of any forgetfulness of the contempts by the judge, especially where the time was relatively brief and the judge, in addition, awaited the transcribing of pertinent portions of the record in order to double-check his recollection of the various offenses. Petitioner's argument virtually proposes the penalizing of the calm, careful action of a judge which is most to be encouraged in certification of contempt. The contention is contrary to the entire import of the decisions in *Sacher* v. *United States,* 343 U. S. 1, 9–10; *Offutt* v. *United States,* 348 U. S. 11, 12; *MacInnis* v. *United States,* 191 F. 2d 157, 161 (C. A. 9), certiorari denied, 342 U. S. 953.

CONCLUSION

The basic principles involved in petitioner's case have been set forth recently and extensively by this Court in *Sacher* v. *United States,* 341 U. S. 1, and *Offutt* v. *United States,* 348 U. S. 11. The Court of Appeals, in affirming the contempt conviction, clearly recognized these principles from which it did not deviate. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

SEPTEMBER 1956.

APPENDIX

In the United States District Court, Southern District of California, Central Division

No. 22672

UNITED STATES OF AMERICA, PLAINTIFF

v.

GEORGE E. SHIBLEY, DEFENDANT

CERTIFICATE RE CONTEMPT OF GEORGE E. SHIBLEY, AN ATTORNEY

I

In conformity with Rule 42 (a), Federal Rules of Criminal Procedure, I hereby certify that the series of criminal contempts set forth below in Paragraphs IV to XIV inclusive were committed in the actual presence of the court, and were seen and heard by the court during the trial of the case of *United States of America* v. *George E. Shibley,* No. 22672, which commenced on October 20, 1953 and was tried in the United States District Court, Southern District of California, Central Division and continued to November 20th, 1953.

II

The defendant, George E. Shibley, at all times mentioned in this certificate, is an attorney at law, a member of the State Bar of California and admitted to practice in the District Court of the United States for the Southern District of California.

The case involved an Information filed by the United States Attorney against the defendant, George E. Shibley, and charged in nine counts, violations of Sec. 622, Title 50 U. S. Code. Count 3 charged a wilful neglect and refusal to appear as a witness before a Military Court of Inquiry, and the remaining counts charged refusal to answer particular questions asked of the said George E. Shibley at the hearing before the Court of Inquiry.

The government offered no proof on count 3 and no proof on counts 8 and 9, and at the close of the government's case the motion by the defendant for judgment of acquittal was granted on these counts.

The trial continued from October 20, 1953 until November 20, 1953, at which time the jury returned a verdict of acquittal of the charge in counts 1, 2 and 5. The jury failed to agree as to counts 4, 6 and 7. Except for October 22 and 23, when this trial was adjourned for the hearing of another matter, and except for November 11th and except for Mondays which were occupied by law and motion and pretrial matters, and several other minor interruptions, the trial occupied the full time of the court from October 20, 1953 to November 20, 1953 inclusive.

A motion to dismiss had previously been made, briefed, argued and overruled by another judge of this court, the Honorable Leon Yankwich, who expressly decided many of the issues in the case, and filed a written opinion, *United States* v. *Shibley,* 112 F. Supp. 734.

After the matter came before me for trial, and in the proceedings before me, I ruled repeatedly:

(1) That this court would follow Judge Yankwich's rulings, and, (2) That this court agreed with Judge Yankwich's rulings and that the matters decided by

him were binding on me and would not be re-argued or reconsidered.

At the inception of the trial before me the defendant, George E. Shibley and his attorney, Daniel G. Marshall appeared in chambers and out of the presence of the jury at the request of the defendant, and the defendant George E. Shibley then stated that he, as an attorney, desired to participate in his own defense, together with Daniel G. Marshall, his attorney. The court ruled that either the defendant George E. Shibley or the attorney, Daniel G. Marshall might try the case, but not both of them; but that if the defendant Shibley elected to act as his own attorney, the attorney Daniel G. Marshall might sit with him at the counsel table but could not address the court. The defendant George E. Shibley conferred with Daniel G. Marshall and elected to try his own case.

After the defendant Shibley undertook his own defense and because of the voluminous, wordy, rambling, repetitious and far fetched objections, contentions and motions made by Shibley acting as his own attorney, the court a day or so later advised George E. Shibley and attorney Daniel G. Marshall that the court would reconsider its ruling and would permit both George E. Shibley and Daniel G. Marshall to participate in the proceedings before the court, as attorneys. This ruling was made in the hope that such action would speed up the trial and would result in more adequate representation for the defendant.

Thereafter the defendant George E. Shibley, acting as an attorney, from time to time undertook the examination and cross-examination of witnesses, the making of motions, objections, offers of proof and argument and on other occasions the defendant George E. Shibley permitted his attorney Daniel G. Marshall to conduct the proceedings, with the result that on sev-

eral occasions the court, out of the presence of the jury advised and cautioned the defendant Shibley as follows :

(1) That Daniel G. Marshall was a competent attorney and able to conduct the defense for him;

(2) That the defendant George E. Shibley, as the party litigant, was too close to the case and too emotionally involved with it and was not adequately representing himself;

(3) That the defendant George E. Shibley was needlessly extending and multiplying the record by repetitious, voluminous, wordy, rambling objections and motions and was continually raising issues and contentions previously ruled upon, and that the results of the defendant George E. Shibley's activities were that he was creating a record of such size and length that if convicted he might be financially unable to pay for the transcribing and printing of a record on appeal. That notwithstanding such advice and caution by the court, defendant George E. Shibley continued to actively participate in the trial and to continue with objections, contentions and arguments as stated above.

That at the inception of the case the defendant George E. Shibley, acting as his own attorney, in a hearing held in chambers and out of the presence of the prospective jury, at the request of the defendant George E. Shibley, Shibley made a lengthy oral motion to dismiss based on various grounds, one of which was the failure of the Information and each and every count thereof to charge a public offense; and that said motion had subdivisions A to J. inclusive, and then proceeded with so-called additional grounds and alternate grounds; and although the court repeatedly stated to and ordered defendant George E. Shibley as an attorney to merely state his motion and not argue the matter, the alleged motion consumed several hours;

that in the case of the making of this motion and thereafter repeatedly throughout the trial after the court ruled on motions and denied the same, George E. Shibley, acting as an attorney, would then state in substance, "may I state additional grounds for the motion" or "I desire to state additional grounds for the motion" or would then remake the same or similar motion merely using different words or phrases.

That at the inception of the making the above oral motion to dismiss, the court stated that there would be incorporated by reference a motion to dismiss theretofore made by or for the defendant before Judge Yankwich and the court stated that the matters covered in the motion to dismiss before Judge Yankwich need not and would not be restated in the motion to dismiss before this court; that notwithstanding such state of the record and the orders and directions of the court to George E. Shibley acting as an attorney, many matters contained in the oral motion to dismiss were matters theretofore presented to and ruled upon by Judge Yankwich and were merely repetitious.

That thereafter on other motions made by George E. Shibley acting as an attorney, the court stated and directed that the defendant Shibley should incorporate by reference the oral motion to dismiss made in chambers and stated that for identification it might be referred to as "the motion to dismiss made in chambers at the inception of the proceedings." That thereafter and because of the rambling, repetitious, voluminous, wordy, unnecessary objections and contentions and motions made from time to time by George E. Shibley, acting as an attorney, the court suggested that the defendant prepare a written summary of the objections that might be made to questions, and suggested further that all the matters of contention and objection raised previously in (1) the

motion to dismiss before Judge Yankwich and (2) the oral motion to dismiss before this court might be called the defendant's "General Objection" and might be incorporated and referred to by the defendant as his general objection without the necessity of repeating, on each occasion, all or many of the objections of the defendant. That on or about October 27, 1953, the defendant's attorney Daniel G. Marshall prepared, served and filed with the court a document entitled, "Defendant's List of Objections to Questions to Witnesses," listing various objections consecutively by number, "which he will adopt by reference as his objections by stating the identifying number thereof." The said objections, some with various subdivisions, ran from 1 to 22 inclusive.

That notwithstanding the statement and order of the court that George E. Shibley, acting as attorney, should incorporate by reference his matters of objection contained in the motion to dismiss before Judge Yankwich, the oral motion to dismiss at the inception of the trial before this court and the filing of the written list of objections, George E. Shibley while acting as an attorney continuously and repeatedly made long, voluminous, detailed, repetitious, wordy and unnecessary motions, objections and offers of proof containing many of the matters previously contained in the said motions to dismiss theretofore referred to; and George E. Shibley, acting as an attorney, would occasionally on his own accord, and occasionally at the suggestion of the court, incorporate by reference the matters theretofore referred to, and then would proceed to specify the same material or much of the same material over again in the present objection or motion.

That it is significant that the proceedings before the Military Court of Inquiry, which led to the filing

of the Information in this court, show similar conduct by George E. Shibley and in that proceeding George E. Shibley as a witness claimed and stated certain privileges of a witness and certain alleged privileges of a witness; that after he would conclude such statement before the Court of Inquiry and after the Court of Inquiry would rule denying his claim of privilege, George E. Shibley would then state in substance, "may I state additional privileges of a witness" and then proceed to state most of the same privileges previously claimed and occasionally additional alleged claims of privilege. That this course of conduct was carried on by George E. Shibley throughout the proceedings before the Military Court of Inquiry. That a similar type of proceeding and conduct was carried out by George E. Shibley acting as attorney before this court.

That because of the rambling, wordy, voluminous, repetitious and unnecessary objections and contentions and motions made in this court by George E. Shibley, acting as an attorney, the court suggested and required in connection with a motion to strike made by George E. Shibley, acting as an attorney that George E. Shibley make a written motion to strike incorporating his objections and contentions and a written motion for judgment of acquittal for use at the close of the government's case. That attorney Daniel G. Marshall thereafter prepared, served and filed on November 3, "Defendant's Motion to Strike Testimony and Exhibits" and on the same date, "Motion for Judgment of Acquittal," the motion to strike consisting of four pages and the motion for judgment of acquittal consisting of eight pages with 28 divisions and numerous subdivisions; that although the said written motions were preferable to the oral proceedings engaged in by George E.

Shibley appearing as an attorney, they likewise were repetitious and included numerous of the objections previously made in the motions to dismiss before Judge Yankwich and before this court. Thereafter other motions and objections were made from time to time by George E. Shibley acting as an attorney, covering matters previously ruled on by Judge Yankwich and by this court. That by such conduct George E. Shibley acting as an attorney intentionally, deliberately, contemptuously and without justification or reason, in bad faith delayed and impeded this trial and interfered with the administration of justice, with the result that the trial consumed approximately 17 trial days, when it could otherwise have been tried in not exceeding 4 to 6 days.

III

That the acts done, the statements made and the conduct engaged in by George E. Shibley as an attorney, in paragraphs IV to XIV inclusive set forth hereafter, were done, said and engaged in by the said George E. Shibley as an attorney, intentionally, deliberately, contempuously, without justification and in bad faith and were made and done and engaged in by George E. Shibley as an attorney, for the purpose of impeding, hindering, obstructing and delaying the progress of the trial, for the purpose of interfering with the administration of justice, for the purpose of harassing the court, and for the purpose of showing and expressing the contempt of George E. Shibley for this court and for the judicial process, and were in violation of the oath and duties of George E. Shibley as an attorney and as a member of the bar of this court.

This paragraph No. III is incorporated by reference in and made a part of each of paragraphs IV to XIV inclusive of this certificate.

IV

The matter in paragraphs I and II are incorporated by reference.

Day by day throughout the trial, on occasions too numerous to specify, George E. Shibley acting as an attorney, in the presence of the court:

(1) Made motions and objections concerning issues and matters which had been theretofore ruled on and decided by this court in the case, and such renewal of the motions and objections were not necessary or proper for the preservation of the point in the record;

(2) Repeated motions and objections after the court had advised and cautioned him that the court had theretofore ruled on the same matters in the case;

(3) Made repetitious, unnecessary and improper offers of proof;

(4) Impeded, obstructed, hindered and delayed the trial by such conduct;

(5) Interfered with administration of justice by such conduct.

That an inspection of the entire record is necessary in order to see the nature and extent of such conduct.

V

On October 29, 1953, Lt. Col. Anderson was examined as a witness. Attorney Daniel G. Marshall had been excused that day to attend other business and George E. Shibley, as an attorney, was conducting the defense.

Cross-examination of Lt. Col. Anderson was started at 4:10 PM by George E. Shibley acting as an

attorney. The examination in chief had been very brief and limited to only one or two matters.

Thereupon George E. Shibley, acting as an attorney, in the presence of the court, began a course of conduct aimed at delaying and impeding the trial. He looked back at the clock in the rear of the courtroom on various occasions; he asked questions, withdrew questions, asked questions to be re-read, asked questions to which objections were sustained on the ground they were outside the scope of direct examination, and made long and wordy speeches and arguments, and although ordered repeatedly by the court to proceed and complete the cross-examination, he continued such delaying tactics. The court advised him the cross-examination of the witness would be completed that session even if the court continued beyond 4:30 PM.

At about 4:30 PM he stated he was "inadequate" to proceed longer and engaged in an emotional scene before the jury, and the court adjourned for the day.

VI

At the end of a trial day on an occasion when the court was about to convene in chambers, out of the presence of the jury for the purpose of discussing instructions, the court, while still in session in the court room, stated its intention to adjourn to chambers for the purpose above, and George E. Shibley, acting as an attorney, stated that he would be absent but that his attorney Daniel G. Marshall would attend and thereupon George E. Shibley left the court room.

That thereafter the court stated to certain officers of the U. S. Marine Corps who were present in the court room, that since they were lawyers they might desire to attend the session in chambers to observe the discussion and settlement of instructions and in-

formed them they might if they desired, attend the session in chambers. Certain of them did then attend the session in chambers as observers.

Thereafter during a subsequent session of the court, in the presence of the court, George E. Shibley, acting as an attorney, accused the court of misconduct in inviting the said officers of the U. S. Marine Corps into the session in chambers but of not inviting his friends and secretary into the session in chambers.

VII

On November 18, 1953, during the trial and in the presence of the court, George E. Shibley, acting as an attorney, said and did the following; "Your Honor did not intervene to protect me in that respect," inferring that the court had intervened to protect the prosecution, when in fact the court had in the instance referred to, interrupted Mr. Deutz, the Assistant U. S. Attorney because of statements made in his argument; and thereafter accused the court of "intervening continually it seems to protect the prosecution;" and thereafter accused the court of "constant interference with the defense in aid of the prosecution, and constant failure to protect the defendant in this case."

VIII

On November 18, 1953, in the presence of the court, George E. Shibley, acting as an attorney, accused the court of "indicating a serious bias and prejudice against me (Shibley) and a serious bias and prejudice in helping Mr. Deutz" the Assistant U. S. Attorney.

IX

That George E. Shibley during the trial and in the presence of the court, acting as an attorney, requested

frequent recesses and in particular on November 18, 1953, requested a recess at ten minutes to three PM and again at ten minutes after three PM and the following occurred:

The COURT. Bring the jury down.

Mr. SHIBLEY. Before the jury comes down, Your Honor, I would appreciate a five-minute recess.

The COURT. You just had a recess.

Mr. SHIBLEY. It wasn't a recess, as far as I was concerned, Your Honor. This matter does involve me, and—it isn't unnatural——

The COURT. How often do we have to have a recess?

Mr. SHIBLEY. Five minutes would be adequate.

The COURT. We gave you a recess at approximately ten minute to three. It is now ten minutes after three. Do you want a recess every twenty minutes?

Mr. SHIBLEY. Your Honor, I did not have a recess. I happened to run out of the court room in the bathroom. Should I keep describing what I did? I relieved myself, I turned around and came back. I don't think I was out of this room for more than two minutes and thirty seconds, and it was not what I call a recess.

X

Prior to and during the argument of this case to the jury on November 18, 1953, the court instructed George E. Shibley that there was no issue in the case as to the truth or falsity of certain charges he had previously made against certain officers of the U. S. Marine Corps, and directed and ordered George E. Shibley that he should not and would not be permitted to argue that issue.

That thereafter on November 18, 1953, in the presence of the court, George E. Shibley, acting as an attorney, continuously and repeatedly argued that par-

ticular issue to the jury even though repeatedly ordered and warned by the court not to argue that issue.

XI

On November 19, 1953, during said trial and in the presence of the court, George E. Shibley, acting as an attorney, during a session on objections to instructions given, stated,

> * * * as I heard you, your Honor, it seemed to me that when you came to line 9 where the instruction says, "if the accused be guilty, say so," that you said in a very loud, determined voice, which I wrote down under my notes at the time, "fairly shouted," although that is probably an exaggeration. I did not notice similar emphasis or loudness, your Honor, as to the next sentence, "if not proved guilty, say so."
>
> The COURT. Mr. Shibley, the record will show that I tried to state those two alternatives with equal emphasis. Your exception is overruled on that ground.

The instructions given, from written instructions on file in this case, contained general instructions that the court had not intended to comment on the evidence and that the jury was the sole judge of the facts and that although the court had asked questions of witnesses, the jury was not to assume that the court held any opinion as to the matters to which the questions related.

XII

On November 20, 1953, during the trial of this action and in the presence of the court, George E. Shibley acting as an attorney, pursued the course of conduct heretofore referred to in paragraphs II and IV of this certificate and made objections and took

exceptions and after the court had ruled, would state; "and we object further, your Honor, on the grounds * * *" etc. and in words of such substance and effect.

XIII

On November 20, 1953, during the trial and in the presence of the court, but in the absence of the jury, George E. Shibley acting as an attorney, immediately following the matters referred to in paragraph No. XII above, engaged in the following colloquy with the court and stated the matters and things hereafter set forth:

The COURT. Just a moment. Mr. Shibley's objections and requests are denied. And you have had about three or four of them, and that is all, Mr. Shibley.

Before the Court of Inquiry, after taking up minutes of time and repeating statements of privilege, you would always end up and say, "May I state further privileges," and then it would go on again for a long time, and then you would wind up, the court would rule, and then you would say, "May I state further privileges?" Now you have had about three or four bites at the apple. That is it.

Mr. SHIBLEY. I object to your Honor's manner of speaking to me at this time, in an angry tone of voice, looking at me in what appears to be a malevolent and angry way, and I assign it as prejudicial error and misconduct.

The COURT. I consider you contemptuous of this court, and we will take that matter up later.

XIV

On November 20, 1953, during the trial and in the presence of the court, George E. Shibley acting as an

attorney assigned as error the fact that Laughlin E. Waters, the United States Attorney and Edward Skelly, Assistant U. S. Attorney, took their place at the counsel table, and George E. Shibley acting as an attorney then stated that this was done by Waters and Skelly "to further impress or put pressure upon this jury to find some sort of verdict against the defendant."

XV

RE AFFIDAVIT OF PREJUDICE

After the verdict of the jury on November 20, 1953, the matter of the summary contempt of George E. Shibley was continued to November 23, 1953, together with motions to dismiss the remaining counts of the information and the matter of resetting for trial.

On November 23, 1953, portions of the transcript were not ready and the court stated it would not retry the remaining counts of the information and the matter would have to be tried by another judge, and the matters were continued to Monday, December 7, 1953.

On December 7, 1953, portions of the transcript were not ready and George E. Shibley was scheduled to go to trial the following day before Judge Harrison on another charge.

On December 7, 1953, George E. Shibley through his attorney, Daniel G. Marshall, filed an affidavit of personal bias and prejudice against me. The court thereupon transferred to the court of the judge handling the criminal calendar, all matters concerning this case except the matter of summary contempt against George E. Shibley and continued the summary contempt matter of December 28, 1953.

The court now rules that George E. Shibley may not utilize an affidavit of bias and prejudice or require this court to pass upon it, or to disqualify itself and thereby prevent the filing of a certificate of contempt against George E. Shibley as an attorney and prevent this court from holding George E. Shibley in summary contempt. To permit the filing and subsequent operation of an affidavit of personal bias and prejudice, after a court had stated it would consider and act upon a matter of summary contempt to so operate as to prevent the judge from proceeding with a matter of summary contempt, would prevent a judge from upholding the dignity of the proceedings in his court, and from carrying out a proper administration of justice.

XVI

On the basis of the matters contained in paragraphs I to XIV inclusive, the court holds George E. Shibley, an attorney at law, and a member of the bar of this court, in summary contempt of this court.

Dated: December 28, 1953.

(S) JAMES M. CARTER,
U. S. District Judge.

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FILED
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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956
No. 322

GEORGE E. SHIBLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

October Term, 1956
No. 322

GEORGE E. SHIBLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

Petitioner prays that this Court grant rehearing of its order of October 15, 1956, denying the petition for a writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above entitled case as prayed for in the petition filed August 15, 1956, herein.

Reasons for Granting Rehearing and Issuing the Writ.

1. At the time of the filing of the petition for a writ of certiorari, the case herein appeared governed by the decision of this Court in *Offutt v. United States*, 348 U. S. 11. It was therefore urged, among other things, that the trial judge was not qualified to conduct the summary contempt proceedings against this petitioner under *Offutt* and that the Court below erred in remanding the case to the same trial judge for reconsideration of sen-

tence (Pet. pp. 20-23). There was, however, another substantial ground available to petitioner in support of the petition for a writ of certiorari which was not presented in the said petition relative to the disqualification of the trial judge.

2. Prior to the contempt proceedings of January 18, 1954 [R. 2587],[1] and on December 7, 1954, counsel for petitioner submitted an affidavit of bias and prejudice, requesting the trial judge to disqualify himself and assign the matter to another judge [C. Tr. 642-57; R. 2580].[2] The affidavit was filed pursuant to the provisions of 28 U. S. C. 144 (June 25, 1948, c. 646, 62 Stat. 898, as amended May 25, 1949, C. 139, Sec. 65, 63 Stat. 99) and in compliance therewith [C. Tr. 642, 657].[3] The Affidavit alleged petitioner's belief that the trial judge had a personal bias or prejudice against petitioner [C. Tr. 643], and then sets forth the facts and reasons for the said belief [C. Tr. 643-57]. The affidavit sets forth the overt manifestations of disappointment expressed by the trial judge when the jury acquitted petitioner of the charges made against him [C. Tr. 643-45]; the denunciation of the petitioner by the trial court before the jury

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[1]The reference "R" is to the Reporter's Transcript of Proceedings.

[2]The reference "C. Tr." is to the Clerk's Transcript of Record.

[3]The statute reads as follows: "When ever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

[C. Tr. 645-48]; the personal hostility of the trial judge to petitioner demonstrated throughout the trial and manifested by aspersions upon petitioner's character as a lawyer and as a man [C. Tr. 650-52], and the patent bias and prejudice of the trial judge against the petitioner and in favor of the prosecutor [C. Tr. 652-53]. Although the affidavit of bias and prejudice was duly filed under the governing statute, and although the jurisdiction of the Court to proceed further was brought timely to the Court's attention, the trial judge refused to disqualify himself [C. Tr. 683-84].

3. A substantial question of jurisdiction and construction of the applicable statute is therefore available which has not been previously presented to this Court. The question reads as follows:

> Whether petitioner was deprived of his liberty without due process of law when, upon the filing of the affidavit of bias and prejudice under 28 U. S. C. 144, the trial judge ruled that he had the right and power to preside as judge at the subsequent summary contempt proceedings and impose a sentence of imprisonment upon petitioner.

4. The purpose of 28 U. S. C. 144 is plainly to secure for all litigants a fair and impartial hearing before a tribunal completely divested of any personal bias or prejudice, and the statute makes it the duty of all Courts to scrupulously adhere to the provisions of the law and to guard against any appearance of injustice. It has therefore been held that when an affidavit of bias and prejudice is filed, the truth of all of the allegations of fact contained therein is admitted and it becomes the duty of the Court to determine only its legal sufficiency, and if the affidavit

meets the requirements of the statute and is accompanied by a certificate of the counsel of record, the presiding judge can proceed no further but is disqualified. *Berger v. United States,* 255 U. S. 22; *Korer v. Hoffman,* 212 F. 2d 211, 212 (C. A. 7, 1954); *Gladstein v. McLaughlin,* 230 F. 2d 762 (C. A. 9, 1955).

The aforesaid principles are equally applicable here. The affidavit of bias and prejudice submitted by petitioner was clearly sufficient in law.

> "But bias must be considered objectively. Few, if any, judges would make the reported remarks, in the course of a trial, unless they had developed definite and positive hostility to plaintiff and his case. Hostility is a form of bias."
>
> *Whitaker v. McLean,* 118 F. 2d 596 (C. A. D. C., 1941).

Affidavits of bias and prejudice are properly submitted in contempt proceedings, and when an attorney is involved call for scrupulous observance of the federal statute applicable thereto.

> "Guilt in a criminal contempt must be established beyond a reasonable doubt. . . . Once established, the penalty of such a judgment against an attorney is long-lived. It does not cease with the payment of a fine or with the discharge of a jail sentence, but, being inherent in the judgment, may arise to confront him throughout his professional career."
>
> *Schmidt v. United States,* 115 F. 2d 394, 398 (C. A. 6, 1940).

It is submitted, therefore, that the trial judge was without power to proceed in the proceedings after the filing of the affidavit of bias and prejudice by petitioner, and

that the purported exercise of jurisdiction thereafter was invalid, and resulted and will result in deprivation of petitioner's liberty without due process of law. The question herein presented should be reviewed by this Court. In *Berger v. United States,* 255 U. S. 22, this Court affirmed that the purpose of the statute is

> "that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment" (pp. 35-36).

This Court added an admonition which, it is submitted, has not been followed in the case herein:

> "And in this there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside?" (p. 35).

Conclusion.

For the reasons set forth above, it is respectfully urged that rehearing be granted and that, upon such rehearing a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the rules of this Court.

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